APPENDIX NO. 2

Supreme Court, U. S.
FILED
JUL 29 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,
United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,
United States of America ex rel.
AMBROSE ST. JOHN, Respondent,
United States of America ex rel.
JAMES R. KEEBLE, Respondent,
United States of America ex rel.
CURTIS SMALL, Respondent,
United States of America ex rel.
ROMAN V. DERBY, Respondent,
United States of America ex rel.
JOSEPH DAY, Respondent,
United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent,
United States of America ex rel.
CLARENCE WALKER, Respondent,
United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 8, 1974
CERTIORARI GRANTED JUNE 3, 1974

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In The

UNITED STATES DISTRICT COURT

District of South Dakota, Southern Division

CIV 72-4055

ROSEBUD SIOUX TRIBE,

Plaintiff

vs.

HONORABLE RICHARD KNEIP, Governor of the State of South Dakota; GORDON MYDLAND, Attorney General of the State of South Dakota; THE COUNTY OF MELLETTE; THE COUNTY OF LYMAN; THE COUNTY OF TRIPP; and THE COUNTY OF GREGORY,

Defendants

BRIEF OF PLAINTIFF

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South Dakota Legal Services, Inc.
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Rosebud, South Dakota 57570

Art Bunce
On the Brief

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Constitution and By-Laws of the Rosebud Sioux Tribe of South Dakota, Approved by Secretary of the Interior, December 16, 1935

INTRODUCTORY STATEMENT

The Rosebud Sioux Tribe has brought this declaratory judgment action seeking declarations that three acts of Congress did not diminish the Rosebud Reservation or alter its bourdaries from those defined in the Act of March 2, 1889. The defendants assert that the three acts did diminish the Rosebud Reservation so that the reservation now embraces only Todd County, South Dakota. Acting on this assertion, the defendants have been exercising civil and criminal jurisdiction over members of the Rosebud Sioux Tribe within those parts of the reservation of 1889 in the counties of Mellette, Tripp, Lyman and Gregory. In these areas the defendants also collect a tax on sales to members of the tribe, regulate hunting and fishing, etc. On the other hand, the tribe, pursuant to its inherent sovereignty and to its specific authority under its federally approved constitution, is entitled to exercise these and other aspects of its jurisdiction throughout the areas in question to the exclusion of the defendants. Without asking this Court to define the exact nature of its jurisdiction, the Rosebud Sioux Tribe does ask the Court to declare whether or not any of the three statutes in question operated to diminish the geographical territory over which the tribe is entitled to exercise this jurisdiction. Therefore, the question presented is: Did the Act of April 23, 1904 (33 Stat. 254, chap. 1484) or the Act of March 2, 1907 (34 Stat. 1230, chap. 2536) or the Act of May 30, 1910 (36 Stat. 448, chap. 260) remove the lands which each opened

to non-Indian settlement from the Rosebud Sioux Indian Reservation, thereby rendering those opened lands no longer "Indian country" as defined at 18 U.S.C. §1151 (a)?

In this brief we deal with the above three acts to show that they were not expressions of Congressional intent to diminish or alter the boundaries of the Rosebud Reservation. Rather, Congress intended only to allow non-Indians to take homesteads on these parts of the reservation in a manner consistent with the heavy moral obligations which the United States has imposed on itself in its dealings with its Indian wards. To show this, we rely on legislative and historical materials and on a line of federal cases, including Seymour v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962); City of New Town, N.D. v. United States, 454 F.2d 121 (8th Cir., 1972); and United States ex rel. Condon v. Erickson, (U.S.D.C.D.S.D., June 27, 1972, CIV71-17S), which construe other statutes with substantially identical language as not having diminished certain other reservations. The Supreme Court of South Dakota has endorsed this line of cases in South Dakota v. Molash, appeal #10959, opinion filed July 19, 1972.

The original establishment of an Indian reservation is much more than a grant of lands to a conquered people. To use a more descriptive phrase, along with the land goes a bundle of rights. One of these rights is the right of the Indians to govern themselves. Williams v. Lee, 358 U.S. 217; 79 S.Ct. 269 (1959); Organized Village of Kake v. Egan, 369 U.S. 60; 82 S.Ct.

562 (1962). Another such right is freedom from state jurisdiction. United States v. Kagama, 118 U.S. 375; 6 S.Ct. 1109 (1886); Seymour v. Superintendent, supra; Annis v. Dewey County Bank, 335 F.Supp. 133 (U.S.D.C.D.S.D., 1971). Another among the many possible rights within the bundle is the right to hunt and fish regardless of state licensing regulations. Menominee Tribe v. United States, 391 U.S. 404; 88 S.Ct. 1705 (1968); Puyallup Tribe v. Department of Game, 391 U.S. 392; 88 S.Ct. 1725 (1968). It is our position that the loss of one right, such as the right to occupy the land, does not necessarily jeopardize the other rights remaining in the bundle of rights as originally granted. For example, in the area of freedom from state criminal jurisdiction, the loss by the tribe of the land upon which a crime is committed does not deprive the Indian defendant of his right to be free from state criminal jurisdiction. Seymour v. Superintendent, supra; City of New Town, N.D. v. United States, supra; United States ex rel. Condon v. Erickson, supra.

The clearest example of this concept appears in Menominee Tribe v. United States, supra. When the Menominee Reservation was originally established, the Indians received a bundle of rights, including not only the right to occupy the land but also the right to hunt and fish freely. By the Menominee Indian Termination Act of 1954, 25 U.S.C. §§891-902, the entire Menominee Reservation was disestablished and destroyed. Nevertheless, the United States Supreme Court held that, although nothing at all was left of the reservation lands after the

termination act, at least one of the original rights in the bundle of rights was not destoryed by the act. That Court failed to find any Congressional intent to end the tribal rights to hunt and fish as originally granted. 391 U.S. at 412-413; 88 S.Ct. at 1711. Citing many cases discussed in this brief, the Court repeated that "The intention to abrogate or modify a treaty is not to be lightly imputed to the Congess." 391 U.S. at 413; 88 S.Ct. at 1711.

Our present position before this Court is similar. It is granted that Congress did intend to modify the treaty and act which established the Rosebud Reservation. However, Congress expressed this intent only in terms of allowing non-Indians to acquire certain lands from the tribe. There was no expression of Congressional intent to take more than the right to use and occupy some of the tribal lands from the original bundle of rights granted to the Rosebud Sioux when the reservation was established. Congress confirmed in the Rosebud Sioux Tribe the right to exercise jurisdiction, whatever the nature of that jurisdiction may be, over the area described in the Act of March 2, 1889. The three acts noted above did not affect this right. Thus, the Rosebud Sioux Tribe still enjoys this right and will continue to enjoy it until Congress directs otherwise.

ARGUMENT

I. It is well-settled that state civil and criminal jurisdiction does not extend to Indians on reservations.

Chief Justice John Marshall first enunciated the legal status of Indian tribes in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). He described Indian tribes as "domestic dependent nations" and characterized their relationship with the United States as that of a ward to his guardian. Ibid., at 17. With this portrayal in mind, the Supreme Court soon after considered the effect of state jurisdiction over reservation Indians and the degree to which such jurisdiction would impinge on the delicate relationship between the federal guardian and its Indian wards. In holding that the state of Georgia lacked jurisdiction, Chief Justice Marshall declared that

> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which plaintiff in error was prosecuted, is, consequently, void, and the judgment is a nullity. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832).

The Supreme Court further amplified and explained this absence of state jurisdiction in United States v. Kagama, 118 U.S. 375, 383-384; 6 S.Ct. 1109, 1114 (1886), in which the Court declared that

> These Indian tribes are the wards of the nation. They are communities dependent on the United States,--dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill-feeding, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.

As was noted by Felix S. Cohen, whom the Supreme Court described as "an acknowledged expert in Indian law" in Squire v. Capoeman, 351 U.S. 1, 8-9; 76 S.Ct. 611, 616 (1956), in his Handbook of Federal Indian Law, (G.P.O., 1942) p. 121,

> John Marshall's analysis of the basis of Indian self-government in the law of nations has been constantly followed by the courts for more than a hundred years. The doctrine set forth in this opinion [Worcester v. Georgia] has been applied to an unfolding series of new problems in scores of cases that have come before the Supreme Court and the inferior federal courts.

For modern applications of this well-established doctrine, see generally Williams v. Lee, 358 U.S. 217; 79 S.Ct. 269 (1959); Groundhog v. Keeler, 442 F.2d 674 (10th Cir., 1971); Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir., 1969); Littell v. Nakai, 344 F.2d 486 (9th Cir., 1965); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir., 1956).

II. The counties of Mellette and Tripp and parts of the counties of Gregory and Lyman were part of the original Rosebud Indian Reservation.

1. The Treaty of Fort Laramie, between commissioners especially appointed and authorized by the President, and the chiefs of the Sioux, Cheyenne, Arapahoe, Crow, Assinaboine, Gros-Ventre Mandan, and Arrickara Nations, was signed on September 17, 1851 and proclaimed by President Millard Fillmore at 11 Stat. 749. This treaty assigned the Sioux most of what is now southwestern South Dakota and northwestern Nebraska, including all of Mellette county, most of Tripp county, and part of Lyman county.

2. The rather tenuous reservation described in the Treaty of Fort Laramie was modified and enlarged by the Treaty with the Sioux and Arapahoe of 1868. It was signed by General William Tecumseh Sherman on behalf of the United States on April 29, 1868, ratified by Congress on February 16, 1869 (15 Stat. 635), and proclaimed by President Andrew Johnson on February 24, 1869. By this treaty, the Great Sioux Reservation was established. It encompassed all of the present state of South Dakota west of the east bank of the Missouri River, including all of the present counties of Mellette, Tripp, Gregory, and Lyman. This hugh tract was

> set apart for the absolute and undisturbed use and occupation of the Indians herein named.

3. The Great Sioux Reservation was diminished from its 1868 boundaries by the Act of March 2, 1889, chap. 405, 25 Stat. 888. This act reduced the Sioux lands to about half their former extent and explicitly restored the remainder to the public

domain, the United States purchasing some of the lost lands outright. Section 2 of this act explicitly

> se. apart for a permanent reservation for the Indians receiving rations and annuities at the Rosebud Agency, in said territory of Dakota (emphasis supplied)

an expanse of about three million acres of land which includes all of the counties of Mellette, Tripp, and Todd, that part of the county of Gregory west of the ninety-ninth degree of west longitude, and that part of the county of Lyman west of the west boundary line of Gregory county extended north and south of the White River. The statutory description of this tract is

> Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel to a point due south from the mouth of Black Pipe Creek; thence due north to the mouth of Black Pipe Creek; thence down White River to a point intersecting the west line of Gregory County extended north, thence south on said extended west line of Gregory County to the intersection of the south line of Brule County extended west; thence due east on said south line of Brule County extended to the point of beginning in the Missouri River, including entirely within said reservation all islands, if any, in said river.

III. This Court must consider four principles in determining whether the situs of an offense is "Indian country" for jurisdictional purposes.

The Eighth Circuit Court of Appeals has suggested the first, second, and fourth of the following four principles to be consider

in determining whether an Act of Congress operated to disestablish or diminish an Indian reservation in the recent case of City of New Town, N.D. v. United States, 454 F.2d 121, 125 (1972). These principles were noted and followed by the present Court in the very recent unreported case of United States ex rel. Condon v. Erickson, (U.S.D.C., D.S.D., CIV71-175), June 27, 1972.

A. Only Congress can diminish or alter the boundaries of an Indian Reservation.

In defining the term "reservation" and comparing it with the term "Indian country", the United States Supreme Court discussed both terms and held that

> when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress. United States v. Celestine, 215 U.S. 278, 282; 30 S.Ct. 93, 95 (1909).

This rule, as established in Celestine, that only Congress may disestablish or alter the boundaries of a reservation, is undoubtedly still good law. The United States Supreme Court, as recently as 1968, has cited Celestine as still the law "With respect to crimes committed by Indians within reservation boundaries". Puyallup Tribe v. Department of Game, 391 U.S. 392, 397, n. 11; 88 S.Ct. 1725, 1728, n. 11 (1968). That Court also cited and followed Celestine in Seymour v. Superintendent, 368 U.S. 351, 359; 82 S.Ct. 424, 429 (1962). The Eighth Circuit also regards Celestine as the law. In Beardslee v. United States, 387 F.2d 280, 285 (1967), that Court per Blackmun described this premise of Celestine as "established", quoted it verbatim, and

treated it as authoritative in deciding a jurisdictional question. The Eighth Circuit described this rule of Celestine as a "principle" and followed it in City of New Town, N.D. v. United States, supra, at 125. Also, in United States ex rel. Miner v. Erikson, 428 F.2d 623, 638 n. 11 (1970), Judge Lay, dissenting on other grounds in a case in which jurisdiction was not a issue, stated that

> The rule is firmly established under United States v. Celestine, 215 U.S. 278, 80 S.Ct. 93, 54 L.Ed. 195 (1909) that once the reservation is established all tracts remain within it until separated by Congress.

Thus, the viability of the rule in Celestine is beyond serious dispute under the decisions of the United States Supreme Court and those of the Eighth Circuit. The decisions in other circuits are in accord. Williams v. United States, 215 F.2d 1, 2 (9th Cir., 1954); Tooisgah v. United States, 186 F.2d 93, 97 (10th Cir., 1950). [1]

B. Courts will not lightly impute to Congress an intent to abridge or abrogate Indian treaty rights or statutory rights.

Because Indian tribes occupy a special position with respect to the United States, they have always been accorded a degree of special treatment in the federal courts. Chief Justice John Marshall described Indian tribes as "domestic

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[1] The Celestine doctrine has been codified in 25 U.S.C. §398(d).

dependent nations" and characterized their relationship with the United States as that of a ward to its guardian. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). An enunciation of the duty imposed on the United States and its courts in dealings with Indian tribes is found in Seminole Nation v. United States, 316 U.S. 286, 296-297; 62 S.Ct. 1049, 1054 (1942):

> Under a humane and self-imposed policy which has found expression in many acts of congress and numerous decisions of this Court, the United States has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Although the Congress does have plenary power over its Indian wards in general, Lone Wolf v. Hitchcock, 187 U.S. 553, 566; 23 S.Ct. 216, 221 (1903), the federal courts will not uphold any abridgement or abrogation of rights or benefits secured to a tribe by treaty or statute unless Congress has made it very clear that it really did intend to strip its wards of a right or benefit while the national honor was pledged to dealing "with perfect good faith towards the Indians". Ibid., 187 U.S. 566; 23 S.Ct. 221. As was declared by the Supreme Court in both Pigeon River Improvement Co. v. Cox, 291 U.S. 138, 160; 54 S.Ct. 361, 367 (1934) and Menominee Tribe v. United States, 391 U.S. 404, 413; 88 S.Ct. 1705, 1711 (1968),

> The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.

This principle was reaffirmed as recently as 1972 by the Eighth

Circuit Court of Appeals in City of New Town, N.D. v. United States, 454 F.2d 121, 125 and by this Court, per Nichol, in United States ex rel. Condon v. Erikson, supra.

C. Doubtful expressions in treaties and statutes dealing with Indian affairs will be construed in favor of the Indians.

As stated by Felix S. Cohen in his authoritative Handbook of Federal Indian Law, (G. P. O., 1942) at p. 37,

> A cardinal rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians.

This general proposition was first declared by Chief Justice John Marshall in the classic case of Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) in which Marshall held that

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.

This rule of construction has been followed consistenly. For example, Chief Justice Stone stated, in Carpenter v. Shaw, 280 U.S. 363, 367; 50 S.Ct. 121, 122 (1930), that

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.

See also Choate v. Trapp, 224 U.S. 665, 675; 32 S.Ct. 565, 569 (1912); Winters v. United States, 207 U.S. 564, 576, 28 S.Ct. 207, 211 (1908); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866). The Court of Claims has applied this rule as recently

as 1972 in Hebah v. United States, 456 F.2d 696, 704.

This rule of construction applies not only to treaties and agreements with the Indians but also to statutes passed for their benefit. The Supreme Court has posited

> the settled rule that, as between the whites and Indians, the laws are to be construed most favorably to the latter.
> Red Bird v. United States, 203 U.S. 76, 94; 27 S.Ct. 29, 36 (1906).

That same Court repeated this edict in Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89; 39 S.Ct. 40, 42 (1918) when it reaffirmed

> the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.

D. The opening of an Indian Reservation to settlement by non-Indians is not inconsistent with its continued existence as a reservation.

In order to appreciate the significance of the seminal case of Seymour v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962), and its relation to the Rosebud Reservation, it is necessary to examine the historical background of the opening of the reservation in considerable detail. This historical digression is in order at this point to illustrate the thinking of Congress and to demonstrate the Supreme Court's understanding of this thinking in Seymour.

1. There was a great and unsatisfied demand by non-Indians for land to homestead.

Around the turn of the century, Congress was seeking both to fulfill its guardianship obligations toward its Indian wards and to accomodate the legitimate demands of non-Indians for land to homestead. By 1900 nearly all of the public domain which was suitable for agriculture had already been disposed of, but still the demand for homesteads far exceeded the supply of public land available for such purposes. For example, the Act of April 23, 1904 (33 Stat. 254, chap. 1484), which opened that part of the Rosebud Reservation in Gregory County west of 99 degrees west longitude to non-Indian settlers made available approximately 2412 homesteads of 160 acres each. About a quarter of a million people descended upon the local land offices at Bonesteel, Fairfax, Chamberlain, and Yankton and 106,308 of these completed applications to be eligible for a drawing for these 2412 homesteads. At the Yankton office, where 57, 434 applications were filed

> the crowds . . . broke all previous records. Hundreds slept in line at the land office, day and night, for a considerable time, to be in readiness to make their filings. On one day in July nearly seven thousand people were thus registered. It was estimated that nearly one thousand people were in line one morning at one time, having slept there all night. At 4 o'clock in the morning the lines were joined by 1,000 more until they extended one block and a half from one office and nearly as far . . . at another office. A carload of ready eatables came from Sioux City and was sold to the men waiting in line. The rush in the city and especially on the trains was something that had never been witnessed before in this state.
>
> Charles Lowell Green, The Administration of the Public Domain in South Dakota, South Dakota Historical Collections, Vol. 20, p. 168 (1940).

For the surplus and unallotted lands on the Rosebud Reservation in Tripp County, a total of 114,769 persons endured great hardships to file for about 4000 homesteads in 1908. A similar crush occurred at the opening of the surplus and unallotted lands in Mellette County in 1911. Ibid.

2. The United States has a duty of exercising a very high standard of good faith in managing the affairs of its Indian wards.

On the other hand, the United States stands in a fiduciary relationship with its Indian wards. The standard of duty of the United States towards the Indian tribes has always been high, certainly high enough to preclude a dimunition of a tribe's reservation without a very strong showing that Congress did affirmatively intend to do so merely to benefit land-hungry non-Indians to whom the United States owed no such special duty of care. The United States Supreme Court declared this special duty toward Indians in United States v. Payne, 264 U.S. 446, 448; 44 S.Ct. 352, 353 (1924). That Court held that Indians

> are an unlettered people, unskilled in the use of language [citation], with regard to whom the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness.

The same Court required an even more stringent standard in Seminole Nation v. United States, 316 U.S. 286, 296-297; 62 S.Ct. 1049, 1054 (1924):

> Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards

3. The United States had been pursuing a careful and conscious policy of assimilating Indians into the majority society.

In the discharge of this duty towards its Indian wards, the United States had been diligently pursuing a deliberate course of civilizing the Indians, educating them in the ways of the dominant white society, and especially encouraging them to abandon war and hunting as their main source of livlihood in favor of farming. Cohen states that

> the use of these lands which the Indians did not "need" for the advancement of civilization was a logical part of a whole and sincerely idealistic philosophy. The civilizing policy was in the long run to benefit Indian and white man alike.
> Cohen, Handbook of Federal Indian Law, (G.P.O., 1942) p. 209.

In 1918 the Supreme Court noted that

> The purpose of creating the [Metlakahtl] reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life.
> Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89; 39 S.Ct. 40, 42 (1918).

More recently the same Court has affirmed that

> Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society.
> Williams v. Lee, 358 U.S. 217, 220; 79 S.Ct. 269, 271 (1959).

The culmination of this policy was the General Allotment Act of February 8, 1887, 24 Stat. 388 25 U.S.C. §331 et seq. This act provided for allotments of 160 acres to heads of Indian families to be held in trust for them by the United States, a fee simple patent to be issued to each allottee at the expiration of the trust period, and citizenship to all allottees who had severed their tribal relations and had adopted "the habits of civilized life". Under this general act, 53,168 Indians received allotments totalling nearly 5,000,000 acres on their reservations between 1887 and 1900. Report of Commissioner of Indian Affairs (1916), pp. 53, 54. By the time that the surplus and unallotted lands on the reservation in the counties of Mellette, Tripp, Gregory and Lyman were opened to non-Indian settlers, each member of the Rosebud Sioux Tribe had already received his allotment. These allotments were scattered throughout the entire 1889 reservation. The Bureau of Indian Affairs allotment records indicate that, prior to the entry of any non-Indian, Indian allotments totalled approximately 486,770.14 acres of the 857,306.23 acres of Mellette county, or 57% of the land in that county; 404,610.62 acres of the 1,036,00 acres in Tripp county and the relevant part of Lyman county, or 39% of the total land in Tripp county and that portion of Lymar county originally within the Rosebud Reservation; and 115,014.58 acres of the approximately 520,000 acres, or 22% of the part of Gregory county within the original reservation. Had there been more Rosebud Sioux, presumably they, too, would have been allotted.

4. Contemporary history indicates that Congress did not intend the three acts to operate to diminish the Rosebud Reservation from its 1889 boundaries.

During the first years of this century, Congress was confronted with the conflicting demands of settlers for homesteads and of Indians for the faithful fulfillment of guardianship obligations. It had to deal with both of these legitimate demands in the light of its determined policy of amalgamating the Indian into the dominant society by promoting his education and civilization, and by transforming him from a hunter and warrior into a farmer. The Acts of April 23, 1904 (33 Stat. 254, chap. 1484), March 2, 1907 (34 Stat. 1230, chap. 2536), and May 30, 1910 (36 Stat. 448, chap. 260) were Congress' response to these conflicting demands for the Rosebud Reservation; they will be referred to in this brief as the "three acts" for convenience. By allowing non-Indians to homestead the vacant lands on the reservation after all the Indians had received their allotments, Congress not only made available land to land-hungry whites which would otherwise remain unoccupied and unproductive, but it also fostered the civilization and advancement of its Indian wards by sprinkling among them white homesteaders who would exemplify the habits and sense of individual initiative and self-reliance that Congress wished to instill in the Indians in the course of assimilating them into the dominant society. In order to earn their patents, the white homesteaders would not only set excellent examples of industriousness but would also teach their Indian

neighbors the skills of farming. And the presence of productive white farmers would enhance the value of the Indian allotments and also encourage railroads to extend their lines to serve these new farmers, and thereby further increase the value of the Indian holdings.

That Congress intended the three acts to operate as a unit in a deliberate effort to meet the genuine needs of the whites clamoring for land and of the Indians seeking improvement of their condition, is amply supported by the statements of Congressman Charles H. Burke, after whom the town of Burke, South Dakota is named, in the Congressional Record. While the bill to open the surplus and unallotted lands on the Rosebud Reservation in Mellette County to white settlers was under consideration by the House, Congressman Burke, author of all three acts, stated that

> [T]his bill is in line--in fact, almost a duplication--of bills that have heretofore passed and become law, proposing to dispose of surplus and unallotted lands of the different Indian reservations of the country. . . [T]here are two propositions to be considered in disposing of the unallotted and unused lands on Indian reservations. One is, at the earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms . . . [This] will have the effect of civilizing the Indians who have allotments and also give value to these allotments which at present are of very little value . . . In addition to that, just as soon as these reservations are opened up and settled [,] railroads usually come in and thereby give greater value to the lands owned by the Indians.
>
> Congressional Record, House of Representatives, 61st Congress, 2nd Session, Vol. 45, pt. 5, pp. 5456, 5457. April 27, 1910.[2]

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[2] Burke's prediction that the introduction of white settlers would

Congressman Carter echoed these views when he spoke in support of a very similar bill (Act of May 29, 1908, 35 Stat. 460, chap. 218) to open the surplus and unallotted lands of the Cheyenne River Reservation in South Dakota to non-Indian settlement:

> Now, there is one proposition which should always be taken into consideration in the opening of an Indian reservation, and that is this, that prior

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f.n.2 (cont.)

make the area more attractive to railroad builders materialized on the Rosebud Reservation just as Burke imagined. As soon as the three acts opened the surplus and unallotted lands on that reservation in each of the counties of Mellette, Tripp, and Gregory to white settlers, a rail line was built soon after into the newly opened county. The Chicago & North Western Railway informs this office that in 1902, just two years prior to the opening of the surplus and unallotted lands in that part of the Rosebud Reservation in Gregory county, the Fremont, Elkhorn and Missouri Valley Railroad Company completed its line from Verdigre, Nebraska to Bonesteel, South Dakota in that part of Gregory county not within the 1889 Rosebud Reservation, less than three miles from the reservation border. When the surplus and unallotted lands on the reservation in Gregory county west of 99° west longitude were opened to settlers in 1904, the Chicago and North Western Railway purchased the line to Bonesteel and began extending it to Gregory, within the reservation, and completed construction in 1907. White settlers first entered the Tripp and Lyman county portions of the reservation in 1908, and the Chicago and North Western Railway immediately followed them, completing the line from Gregory in Gregory county to Winner in Tripp county in 1911. In the same year the first white settlers were permitted to enter the surplus and unallotted lands of the reservation in Mellette County, and the Chicago and North Western Railway dutifully began to extend its line into Mellette County after them. However, this last extension was considerably longer than any of the previous extensions and was interrupted by World War I and the ensuing shortages, so that this longer line to Wood in Mellette county was not completed until 1929. It should also be noted that only the Todd county portion of the Rosebud Reservation was never opened to non-Indian settlers and to this day Todd county had no railraod. Therefore, one may safely infer that the railroad almost immediately followed the white settlers to whatever surplus and unallotted lands of the reservation were opened, just as the chief architect of the three acts and Congress had in mind in drafting this legislation.

> to the time of the opening of that reservation the lands are not worth near so much money as they are after the farmers begin to come in, settle, and build homes.
>
> That is what makes the land valuable . . . when they do come in this land will be improved, and as it is improved it will increase in value all the land on what is now the reservation, including the allotments of the Indians who now own the land. As the land around each Indian's allotment is improved and put in a higher state of cultivation just in that proportion will the Indian's original allotment increase in value and be made more productive . . . For that reason, Mr. Speaker, I intend to give my sanction to the bill by voting for it . . . and thereby keep the plighted faith of the Federal Government with its helpless wards. (Applause)
>
> Congressional Record, House of Representatives, 60th Congress, 2nd Session, p. 7006. May 26, 1908.

It was with these historical factors presumably in mind that the United States Supreme Court considered the case of Seymour v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962). The question presented in that case was whether the Act of March 22, 1906, 34 Stat. 80, chap. 1126, which opened the surplus and unallotted lands on the Colville Reservation in Washington to non-Indian settlers, would operate to disestablish that reservation and render it no longer "Indian country" for jurisdictional purposes. This act is substantially identical to the Act of June 1, 1910, 36 Stat. 455, chap. 264, considered in City of New Town, N.D. v. United States, supra, and to the three acts, as will be shown below. In reaching its decision in Seymour, the Court specifically noted:

> a. "this country's relationship to its Indian wards" 368 U.S. at 354; 82 S.Ct. at 426

b. that a previous act (Act of July 1, 1892, 27 Stat. 62, chap. 140) had expressly restored a portion of the Colville Reservation to "the public domain" 368 U.S. at 355; 82 S.Ct. at 427

c. that the instant Colville Act had not expressly restored any of the Colville Reservation "to the public domain" 368 U.S. at 355; 82 S.Ct. at 427.

d. the rule of Celestine, 368 U.S. at 359; 82 S.Ct. 429

The Court's decision, presumably made with the above historical circumstances in mind, was that the Colville Act, in opening the surplus and unallotted lands on that reservation to non-Indian settlers, did not expressly disestablish or diminish the Colville Reservation, and that, because it had not do so expressly, it had not done so at all. On the contrary, the Court held that the opened lands were still part of the reservation and therefore still "Indian country" for jurisdictional purposes. 368 U.S. at 355; 82 S.Ct. 427. The Colville Act, when viewed in the light of the conflicting Indian and non-Indian demands for the disposition of the vacant lands,

> did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards. 368 U.S. at 356; 82 S.Ct. at 427.

IV. Judicial interpretation of the three acts is governed by certain federal decisions rather than by the decisions of the South Dakota Supreme Court.

A. The decisions of federal courts prevail over those of state courts in the interpretation of a federal statute.

It is beyond serious doubt in this federal system of government that a state's courts are the authoritative interpreters of that state's statutes, subject only to that state's constitution and the federal constitution, statutes, and treaties. It is equally beyond question that the federal courts are the authoritative interpreters of federal statutes, subject only to the federal constitution. United States v. Gilbert Associates, Inc., 345 U.S. 361, 363; 73 S.Ct. 701, 703 (1953).

B. Certain recent federal decisions govern the interpretation of federal statutes such as the three acts.

The federal case of Seymour v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962) is the definitive federal holding concerning the proper interpretation of a federal act opening the surplus and unallotted lands on an Indian reservation to non-Indian settlers. This case dealt with an appeal from a state court decision which denied that the state lacked jurisdiction to prosecute the petitioner. The petitioner claimed that jurisdiction was exclusively federal under 18 U.S.C. §1153 since the situs of the offense was within

"Indian country" as defined by 18 U.S.C. §1151. In construing the Colville Act, the language of which is substantially identical to the language of the three acts, the Supreme Court held that the Colville Act did not disestablish or diminish the reservation so opened. This is precisely the question in the instant case; thus, Seymour should govern the construction of the three acts.

Implementing and elaborating on Seymour is the recent case of City of New Town, N.D. v. United States, 454 F.2d 121 (8th Cir., 1972), in which the Eighth Circuit considered exactly the same claim as in Seymour for the Fort Berthold Reservation in North Dakota. That Court applied the principles of Seymour to a 1910 statute, the language of which is also substantially identical to the language of the Colville Act and the three acts. Following the reasoning of Seymour, the Court held that the 1910 statute (Act of June 1, 1910, 36 Stat. 455, chap. 264) did not alter the boundaries of or diminish the Fort Berthold Reservation.

In construing a federal statute, substantially identical to the Colville Act construed in Seymour, in Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001 (U.S.D.C.,D.Minn., 1971), Judge Devitt analyzed the federal statute in terms of the principles set forth in Seymour and held that the instant statute did not disestablish the Leech Lake Reservation and that

> its purpose was not to terminate the reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others.
> 334 F.Supp. 1005.

Applying both Seymour and New Town is the very recent case

case of United States ex rel. Condon v. Erickson, (U.S.D.C., D.S.D., June 27, 1972) in which the present Court interpreted the federal statute (Act of May 29, 1908, 35 Stat. 460, chap. 218) which opened the surplus and unallotted lands of the Cheyenne River Reservation to non-Indian settlers. The Court held that, at least under New Town, the act in question had not operated to disestablish or diminish the Cheyenne River Reservation and that reservation was therefore still "Indian country" for jurisdictional purposes. The Rosebud Sioux Tribe makes the same claim for its reservation regarding the three acts: since the language of the acts considered in Seymour, New Town, and Condon is substantially identical to the language of the three acts, those three acts must also have not altered the boundaries of the Rosebud Reservation.

C. The decisions of the Supreme Court of South Dakota have been superseded by recent federal decisions and are no longer applicable.

The South Dakota Supreme Court has often grappled with Indian jurisdictional questions such as the one presented in the instant case. Such state decisions would be entitled to considerable weight in the absence of authoritative guidance from the federal courts in the interpretation of the federal statutes. These state decisions include State v. Sauter, 205 N.W. 25 (1925); Application of DeMarrais, 91 N.W.2d 480 (1958); State ex rel. Hollow Horn Bear v. Jameson, 95 N.W.2d 181 (1959); State v. DeMarrais, 197 N.W.2d 225 (1961);

State v. Barnes, 137 N.W.2d 683 (1965); Lafferty v. State, 125 N.W.2d 171 (1963); and Wood v. Jameson, 130 N.W.2d 95 (1964). However, the interpretations accorded to federal statutes in these cases have been superseded by authoritative and conflicting interpretations in Seymour, New Town, Beardslee, and Condon, supra. The first four of these cases rely on interpretations of federal statutes, which interpretations have been superseded by the construction of substantially identical statutes in Seymour, New Town, and Condon, supra. Both DeMarrais cases and the Hollow Horn Bear case relied on an interpretation of 18 U.S.C. §1151(c) which has been ruled incorrect in Beardslee, supra. This error and an untenable attempt to distinguish Seymour are the basis of Lafferty. Only Barnes and Wood mention Seymour. The latter baldly asserts, without any support whatever, that

> we think it was the purpose of Congress to disestablish the reservation and restore to the public domain the lands therein . . .
> 130 N.W.2d 99.

Barnes relies on Lafferty, and an equally untenable distinction from Seymour. Also, the more recent cases of Smith v. Temple, 152 N.W.2d 547 (1967) and Kain v. Wilson, 161 N.W.2d 704 (1968) are inapplicable because they deal with jurisdiction over parts of South Dakota reservations which have never been opened to non-Indian settlement.

For the above reasons, these cited decisions of the South Dakota Supreme Court, which attempt to interpret federal statutes for jurisdictional purposes, are inapplicable to the instant interpretation of the three acts.

D. The decisions of the South Dakota Supreme Court have yielded to recent federal interpretations of statutes similar to the three acts.

In South Dakota the spell of the inapplicable or incorrect state supreme court decisions has broken. Judge Hersrud, in unreported circuit court opinions in State v. Mongram and State v. Molash, Eighth Judicial Circuit, Feb. 10, 1971, held that the state lacked jurisdiction over an Indian defendant for a crime, the situs of which was a part of the Standing Rock Reservation which was opened to non-Indian settlement under a federal statute substantially identical to the acts in Seymour, New Town, and Condon. Judge Hersrud concluded that

> this Court holds that Seymour v. Superintendent, 368 U.S. 351, overrules the case law in South Dakota. Our case law holds the more sensible and practical solution to the question of jurisdiction and this Court reluctantly finds it to be superseded by the above cited and other cases.

On July 19, 1972 the South Dakota Supreme Court unanimously affirmed Judge Hersrud. It held that under both Seymour and New Town the statute in question (Act of February 14, 1913, 37 Stat. 675, chap. 54).

> did not disestablish that part of the Standing Rock Reservation embracing the City of McLaughlin, South Dakota, and that the trial court correctly concluded that the state is without jurisdiction over the defendant for the offense charged.
> [case #10959, the full text of which will be found in the appendix]

V. Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation.

A. Various Presidential proclamations indicate that at least two Presidents have interpreted the three acts not to have diminished the Rosebud Reservation.

As they were specifically directed by the three acts, Presidents Roosevelt and Taft issued proclamations prescribing the mechanisms by which the surplus and unallotted lands opened to non-Indian settlement by the three acts would be made available to homesteaders. That President Taft, as the chief executive of the United States, the guardian of the Rosebud Sioux, contemplated an undiminished Rosebud Reservation is clearly indicated by the terms of his proclamation of June 29, 1911 (37 Stat. 1691, reproduced in full in the appendix):

> I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the Acts of Congress approved May 27, 1910 (36 Stat. 440) and May 30, 1910 (36 Stat. 448), do hereby prescribe, proclaim and make known that all the non-mineral, unallotted, unreserved lands within the Pine Ridge and Rosebud Reservations in the State of South Dakota . . . shall be disposed of under the general provisions of the homestead law of the United States . . . [emphasis supplied]

President Theodore Roosevelt also contemplated an undiminished Rosebud Reservation when he issued his proclamation of August 24, 1908 (35 Stat. 2203, reproduced in full in the appendix) stating that

> . . . by the Act approved March 2, 1907 (34 Stat. 1230), the Congress directed that all that part of the Rosebud Reservation [description] be disposed of under the general provisions of the homestead laws of the United States . . . [emphasis supplied]

President Roosevelt also proclaimed the opening of the surplus and unallotted lands in Gregory County on May 13, 1904 (33 Stat. 2354, reproduced in full in the appendix). He employed language in that proclamation which nearly duplicated the language which Congress used in the Act of April 23, 1904. From this language, one might infer that Roosevelt did contemplate a diminished Rosebud Reservation. However, that act contains internal inconsistencies which render it subject to the rule that ambiguities in statutes passed for the benefit of Indian tribes be resolved in the tribes' favor, as will be shown below. Thus, Roosevelt's identical language in this proclamation should be equally subject to this rule.

B. The Secretary of the Interior has interpreted the three acts as not having diminished the Rosebud Reservation.

When the Rosebud Sioux Tribe submitted a proposed tribal constitution to the Secretary of the Interior for his approval pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U.S.C. §476 et seq.), the Secretary approved the constitution on December 16, 1935 containing the following article:[3]

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[3] A certified copy of this constitution will be found in the appendix.

Article I - Territory

> The jurisdiction of the Rosebud Sioux Tribe of Indians shall extend to the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889, and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law.

Thus, the Secretary of the Interior joined the Rosebud Sioux Tribe in regarding the Rosebud Reservation as undiminished by the three acts. Since this officer is chiefly responsible for administering the federal trust relationship on Indian reservations, his implicit interpretation of the three acts is entitled to "great weight" and "is not to be overturned unless clearly wrong . . .". United States v. Jackson, 280 U.S. 183, 193, 50 S.Ct. 143, 146 (1930); Stevens v. Commissioner, 452 F.2d 741, 746 (9th Cir., 1971).

C. The Field Solicitor for the Bureau of Indian Affairs regards the three acts as not having altered the boundaries of the Rosebud Reservation.

Wallace G. Dunker, Field Solicitor of the Bureau of Indian affairs, issued a memorandum, dated April 6, 1972, to the Area Director of the Bureau advising that, in his opinion, the present boundaries of the Rosebud Reservation remain as they were established by the Act of March 2, 1889. This memorandum is reproduced in full in the appendix. It concludes that

> the three Acts of Congress cited above ". . . did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and

> trustees for the Indians, regarded as beneficial to the development of its wards . . ." as the court stated in Seymour v. Superintendent. Clearly revealing the intent of Congress, the title to the 1907 and 1910 Acts declared the purpose to be "To authorize the sale and disposition of a portion of the surplus and unallotted lands . . .", and the provisions thereof set forth the necessary details at the same time reserving rights to the Indians to which they are entitled by treaty or agreement.
>
> Accordingly, it is my opinion that pursuant to applicable legal principles, the legal boundaries of the Rosebud Indian Reservation have not been diminished or altered by Congress since the establishment of the original boundaries thereof by the Act of March 2, 1889, 25 Stat. 888, which are described above.

Since the Bureau of Indian Affairs is the branch of the Department of the Interior chiefly charged with the

> management of all Indian affairs and of all matters arising out of Indian relations
> 25 U.S.C. §2

the opinion of its field solicitor is also entitled to "great weight" and is also "not to be overturned unless clearly wrong, or unless a different construction is plainly required." United States v. Jackson, supra.

VI. Since the plain language of the three acts is substantially identical to the plain language of the acts considered in Seymour, New Town, and Condon, this Court must adhere to the principles of these cases in interpreting the three acts.

A. The plain language of the three acts is substantially identical to the plain language of the acts considered in Seymour, New Town, and Condon.

For ease of reference, the following acts will be referred

to herein by the following names:

a. Act of March 22, 1906, 34 Stat. 80, chap. 1126 - Seymour Act (Colville Reservation, Washington)

b. Act of June 1, 1910, 36 Stat. 455, chap. 264 - New Town Act (Fort Berthold Reservation, North Dakota)

c. Act of May 29, 1908, 35 Stat. 460, chap. 218 - Condon Act (Cheyenne River Reservation, South Dakota)

d. Act of April 23, 1904, 33 Stat. 254, chap. 1484 - Gregory County Act

e. Act of March 2, 1907, 34 Stat. 1230, chap. 2536 - Tripp County Act [including part of Lyman County]

f. Act of May 30, 1910, 36 Stat. 448, chap. 260 - Mellette County Act

1. Title

Of the above six acts, all but the Gregory County Act explicitly state in their titles that their purpose is the sale and/or disposition of some of the surplus and unallotted lands on the reservation. The Gregory County Act differs from the other five acts in that it is the first and it alone is a Congressional ratification of an agreement previously entered into in 1901 between a United States Indian Inspector and the Rosebud Sioux Tribe. The operative language of this 1901 agreement is:

> The said Indians belonging to the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota. [description]
> Congressional Record, House of Representatives, 58th Congress, 2nd Session, p. 1422; January 30, 1904.

The Gregory County Act incorporates this language verbatim, as it does the entire text of the 1901 agreement. However, when Congress incorporated the inspector's three-year-old language into the Gregory County Act, it clearly did not intend that the act would be an outright purchase of the tribe's entire interest, but rather that the United States would act only as trustee and agent for the tribe in disposing of some tribal lands to settlers; the United States bound itself only to purchase school lands and try to find buyers for the other relinquished lands, even though the language of the agreement was taken from a time when a completely different policy prevailed in Indian land acquisitions. This change in Congressional policy is explicitly noted in Report No. 443 on H. R. 10418, House of Representatives, 58th Congress, 2nd Session, January 21, 1904, p. 2. This report was authored by Congressman Burke of South Dakota, who was also the author of the three acts. Burke states that:

> Both of these bills [i.e., both the House and Senate versions] present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians

and pay them therefor and then open the same to entry and settlement . . .

> This bill provides that the lands shall be disposed of under the homestead laws by the settler paying therefor and the proceeds paid to the Indians, and it is expressly provided by Section 6 of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or dispose of the same except as provided, or to guarantee to find purchasers for said lands, it expressly stating that the intention of the act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale thereof only as the same are received.

Thus, it is clear that, although the Gregory County Act does employ some language to the effect that the United States was purchasing a tract of land outright for a consideration with the tribe retaining no interest, this was not the case. Congress actually had just abandoned this policy in favor of a policy whereby the United States acted merely as trustee for the sale of the lands for the Indians, with the proceeds of the sale being paid to the tribe only if and when actually received from the homesteaders, instead of the United States paying the Indians a lump sum immediately and then trying to find buyers to recover the purchase price. As Burke stated, the Gregory County Act would establish a new policy, the refinements of which had yet to be made. Certainly Congress can be excused for employing language suggested by another and echoing an abandoned policy in its very first attempt to implement a new policy; the titles of each of the other five acts mentioned above indicate that this Congressional confusion was only monetary and that the "sell and dispose" formula really expressed Congress' true intent after it

realized that the outdated "cede, surrender, grant, and convey" formula was no longer appropriate. This is especially evident when, instead of paying the Lower Brule Sioux a cash sum immediately as the consideration for their land as had uniformly been done under the previous policy, Article II of the Gregory County Act stipulated that:

> In consideration of the land ceded, relinquished, and conveyed by article one of this agreement, the United States stipulates and agrees to dispose of the same to settlers under the provisions of the homestead and townsite laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township, and to pay to said Indians the proceeds derived from the sale of said lands . . .

At the very most, Congress exhibited an understandable ambivalence and confusion in the Gregory County Act over exactly what language would be most appropriate to express the terms of the new land acquisition policy. The legislative history dispels the confusion on this point. In addition, the archival memoranda review the above language of the act subject to the rule, noted on page 8 of this brief, that doubtful expressions in treaties and statutes dealing with Indian affairs must be resolved in favor of the Indians. Therefore, Congress had exactly the same plan in mind in dealing with the lands of its Indian wards in all of the above six acts, even though it used inappropriate language in its first statutory attempt to implement this plan.

2. Lands exempted from sale and/or disposition

The Seymour Act specifically reserved from sale or

disposition the following categories of land:"

1. mineral lands ($3)

2. town site lands ($11)

3. lands necessary to provide sites for the Indian agency, Indian school, religious missions, sawmills, and gristmills, up to 480 acres ($7)

4. timber lands ($5)

5. irrigation project lands ($12)

The New Town Act made the following reservations from the lands to be sold and disposed:

1. coal and other mineral lands ($1)

2. town site lands ($6)

3. lands necessary to provide sites for the Indian agency, Indian school, and religious missions ($3)

4. tribal forest reserve ($10)

5. power or reservoir sites ($5)

6. demonstration farm site, up to 640 acres ($4)

7. a site sufficient to preserve the ruins of the Fort Berthold Indian village and burial grounds ($3)

8. school sections ($8)

The Condon Act made similar reservations from sale and disposition for the following purposes:

1. coal lands ($3)

2. town site lands ($5)

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4 The Seymour Act refers to the "diminished" reservation. The word "diminished" in this act refers to the fact that part of the original Colville Reservation was expressly "vacated and restored to the public domain" by the Act of July 1, 1892, 27 Stat. 62, chap. 140. The Seymour Act deals with the Colville Reservation as diminished by this earlier act.

3. lands necessary to provide sites for the Indian agency, Indian school, and religious missions ($1)

4. school sections ($1)

The Gregory County Act reserved the following classes of land from sale to settlers:

1. 398.67 acres for a subissue station, an Indian day school, one Catholic mission, and two Congregational missions ($2)

2. school sections ($4)

The Tripp County Act made similar exemptions for land for these purposes:

1. town site lands ($4)

2. school sections ($6)

The Mellette County Act reserved from sale and disposition land for the following purposes:

1. town site lands ($3)

2. school sections ($8)

3. lands necessary to provide sites for the Indian agency, Indian school, and religious missions ($1)

3. Prior allotment of Indians

Each of the six acts named above, except the Gregory County Act, specifically provides in its second section for some sort of allotment of Indians prior to the entry of the first non-Indians. The Seymour Act provides for an additional 80 acres to all. The New Town Act specifies either 160 acres of agricultural land or 320 acres of grazing land to all. The Condon Act requires that all unallotted Indians be allotted. The Tripp County Act provides allotments of 160 acres to all unallotted children of a Rosebud Sioux parent. And the Mellette

County Act requires that all allotments in that county be completed prior to the arrival of the first whites. The Gregory County Act makes no mention of prior allotment, perhaps because the question had not occurred to a Congress preoccupied with its first attempt to draft a statute under the new land disposal policy.

4. In lieu Indian allotments

The New Town, Condon, Tripp, and Mellette Acts each contain a special provision allowing any Indian who has an allotment on a portion of the reservation to be opened to non-Indians to relinquish that allotment and accept an in lieu allotment on the unopened portion of the reservation. These provisions are found in §1 of the New Town Act, §2 of the Condon Act, §2 of the Tripp County Act, and §1 of the Mellette County Act. No such provisions appear in either the Seymour or Gregory County Acts. However, one would not expect to find such a clause in the Seymour Act because that act opened the entire reservation to non-Indians, leaving no unopened portion of the reservation in which a Colville Indian could accept an in lieu allotment. Instead of providing for in lieu allotments, Article IV of the Gregory County Act guarantees that all allottees "shall enjoy the undisputed and peaceable possession their allotted lands . . .".

5. Price and sales

Each of the six statutes noted above prescribe a precise method by which the prices of the opened lands would be set and a schedule according to which payments would be made by

the homesteaders. The Gregory County (§2) and Tripp County (§3) Acts set specific prices for the land without regard for location on a scale which dropped over time. Each of the other four acts provided for a commission to be appointed to classify and appraise the lands to be opened according to location and quality. The land would be sold at its appraised value, one-fifth down, the remainder in five equal payments over either five or six years. The language employed to describe this process is nearly identical in the Seymour, New Town, Condon, and Mellette County Acts.

6. Forfeiture of all interest by entrymen for non-payment

Section 3 of the Seymour Act, §9 of the New Town Act, §4 of the Condon Act, §2 of the Gregory County Act, §3 of the Tripp County Act, and §6 of the Mellette County Act all contain substantially the following provision regarding forfeiture of all interest by entrymen who fail to satisfy their payment schedules:

> In case any entrymen fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry cancelled

and the lands be again subject to entry.

7. Commutation of entries

Each of the six acts noted above, except the Seymour Act, contains the following proviso, in §9 of the New Town Act, in §4 of the Condon Act, in §2 of the Gregory County Act, in §3 of the Tripp County Act, and in §6 of the Mellette County Act:

> nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made.

The Seymour Act contains no such proviso.

8. Disposition of unsold lands

Each of the six acts under consideration made similar provisions for the disposition of lands opened but not sold to entrymen after at least four years from the date of opening.

Section 3 of the Seymour Act directs that these lands be sold to the highest bidder for cash after five years for at least one dollar per acre. Any lands remaining unsold after ten years would be sold to the highest bidder for cash at whatever price they would bring. Section 3 of the Tripp County Act makes exactly the same provision, except its dates are four and seven years, respectively, and the minimum price after four years is $2.50 per acre.

Section 9 of the New Town Act, §4 of the Condon Act, and §6 of the Mellette County Act all identically provide that all opened lands not sold after four years may be reappraised and sold at the new appraised price, at the discretion of the Secretary of the Interior. Section 4 of the Condon Act additionally provides that all lands still unsold after seven years be sold to the highest bidder for however much cash they would fetch.

The Gregory County Act, in its second section, would sell all remaining lands after four years for cash, with no more than one section per buyer.

9. Veterans' rights

Section 2 of the Condon, Gregory County, Tripp County, and Mellette County Acts, section 4 of the Seymour Act, and section 9 of the New Town Act all contain the following identical guarantee of veterans' rights:

> the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

10. Details of opening

Section 3 of the Seymour Act, section 9 of the New Town Act, and sections 2 of the Condon, Gregory County, Tripp County, and Mellette County Acts all specify that the surplus and unallotted lands be opened under the terms of a Presidential proclamation

> which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation.

11. Disposition of net proceeds of land sales

Each of the six acts noted above makes careful provision for the net proceeds of the sale of the surplus and unallotted lands to be deposited in the United States Treasury in accounts established in the names of the various tribes. The acts differ only in particulars, such as whether the account will bear interest, whether Congress or the Secretary of the Interior shall draw on the account, and whether there are any restrictions

on what these funds may be used to purchase. Every one of the six acts requires that the net proceeds be spent exclusively for the benefit of the respective tribes.

Section 6 of the Seymour Act established an account without interest for the Colville Indians and authorized the Secretary of the Interior to expend this account "for the comfort, benefit, and improvement of said Indians".

Section 11 of the New Town Act established an account bearing 3% interest for the Fort Berthold Tribe and subjected this account "to appropriation by Congress for their education, support, and civilization."

The Secretary of the Interior was empowered by Section 6 of the Condon Act to draw on the account of the Cheyenne River Sioux Tribe, which account bore 3% interest, "for their benefit".

Article III of the Gregory County Act specified in great detail how this account would be spent over time, partly to purchase specified numbers and grades of cattle for the tribe, partly to be distributed on a per capita basis.

The fifth section of the Tripp County Act divided the net proceeds of this land sale into two funds: one, of $1,000,000, would bear 3% interest for ten years and would eventually be distributed per capita; the second would be any amounts over the $1,000,000 and would be spent by the Secretary of the Interior "for their benefit".

Section 7 of the Mellette County Act simply established a 3% account subject to Congressional appropriation "for their education, support, and civilization".

12. Role of the United States

All of the six acts being compared herein, except the Seymout Act, contain the following critical disclaimer of responsibility by, and enunciation of the role of, the United States:

> That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided[.]

The Seymour Act contains the same clause in slightly abbreviated form. These clauses are found in §9 of the Seymour Act, §14 of the New Town Act, §9 of the Condon Act, §6 of the Gregory County Act, §8 of the Tripp County Act, and §11 of the Mellette County Act.

These identical clauses in each of the six above acts make it indisputable that the United States was acting only as the trustee of the Indians for the disposition of some of their lands. The United States acquired nothing under the acts except the right of use and occupancy that had formerly resided in the tribes, so that the United States might convey this right of occupancy to entrymen. Since this was explicitly a trust relationship, beneficial title to all the opened lands remained in the tribes, until and unless the entrymen perfected their entries, or until and unless some other disposition was

made. See 43 U.S.C. §161 et seq. Only upon the issuance of a patent to the entryman would the legal title of the United States and the beneficial title of the tribe merge and pass a fee simple to the entryman. Thus, none of the six acts expressly deprived the tribes of their beneficial interest in the opened lands; the Indian title to these lands would never be extinguished if the lands were not disposed of. See generally Ash Sheep Co. v. United States, 252 U.S. 159, 164: 40 S.Ct. 241, 242 (1920); Morrison v. Work, 266 U.S. 481; 45 S.Ct. 149 (1925); Minnesota v. Hitchcock, 185 U.S. 373, 394-395; 22 S.Ct. 650, 658 (1902); Felix S. Cohen, Handbook of Federal Indian Law, (G.P.O., 1942) pp. 334-336. Surely the prospect of lingering Indian title is incompatible with the notion of a diminished reservation.

The Act of March 2, 1889, which explicitly restored much of the Great Sioux Reservation of the Treaty of 1868 to the public domain and divided the remainder into six separate reservations, contains no such clause limiting the role of the United States to that of trustee and disclaiming and promise on the part of the United States to buy any land not sold to settlers. On the contrary, Section 21 of the Act of March 2, 1889 expressly bound the United States to purchase any and all lands in the former portion of the reservation which remained unsold ten years after the opening of those lands.

13. Appropriations

Each of the six acts under consideration makes similar appropriations to cover the costs of the projects undertaken.

The Seymour Act is the only act under consideration which did not provide for school sections to be granted to the state; consequently, it is the only one of the six acts not to appropriate some amount to pay for such lands. The other five acts make the following appropriations to pay for school sections granted to the states:

New Town Act ($12)	$100,000
Condon Act ($8)	$225,000
Gregory County Act ($5)	$ 75,000
Tripp County Act ($7)	$165,000
Mellette County Act ($9)	$125,000

In addition to these appropriations, the four acts which set the price of the land by appraisal appropriate a sum to pay the costs of the survey, appraisal, and classification. The following acts appropriate these sums for these purposes:

Seymour Act ($10)	$ 75,000
New Town Act ($12)	$100,000
Condon Act ($8)	$ 75,000
Mellette County Act ($9)	$ 35,000

The Gregory County and Tripp County Acts make no such appropriation because the price of the lands in those areas are set by statute over time rather than by appraisal. Also, the New Town Act ($4) appropriates $25,000 to pay for the demonstration farm.

14. Preservation of Indian rights

Of the six acts noted above, all but the Seymour Act contain a crucial clause guaranteeing the preservation of Indian rights, substantially identical to the following:

> . . . nothing in this act contained shall be construed to deprive said Indians of the Fort Berthold Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act.

This clause is found in §14 of the New Town Act, §9 of the Condon Act, Article V of the Gregory County Act, §8 of the Tripp County Act, and §11 of the Mellette County Act. Only the Seymour Act lacks such a clause and, in spite of this omission, the Supreme Court still interpreted that act as not having diminished the Colville Reservation. In this respect, the other five acts present even stronger cases for undiminished reservations, since one of the prime benefits to which a tribe is entitled is surely that of a secure reservation with a fixed boundary. The Treaty with the Sioux and Arapahoe was signed by General William Tecumseh Sherman for the United States on April 29, 1868, was ratified by Congress on February 16, 1869 (15 Stat. 635), and was proclaimed by President Andrew Johnson on February 24, 1869. Article 2 of this treaty

> set apart for the absolute and undisturbed use and occupation of the Indians herein named

all of the present state of South Dakota west of the east bank of the Missouri River and part of what is today southern North Dakota. This was the Great Sioux Reservation which was diminished from its 1868 boundaries by the Act of March 2, 1889 to include all of the present counties of Todd, Mellette, and Tripp, and the parts of the counties of Lyman and Gregory noted above for the Rosebud Sioux. Section 2 of the Act of March 2, 1889 set these lands apart as

> a permanent reservation for the Indians receiving rations and annuities at the Rosebud Agency. (emphasis supplied)

Unless the defendants can point to some Act of Congress which clearly expressed a Congressional intent to diminish the Rosebud Reservation and thereby abrogate the tribe's right to an undiminished and secure reservation, that reservation exists today just as it did on March 2, 1889.

Congress is certainly capable of making its intent clear to disestablish a reservation and restore it to the public domain. It did so once in the Act of July 1, 1892 which diminished the Colville Reservation when it

> expressly vacat[ed] the South Half of the reservation and restor[ed] that land to the public domain. Seymour v. Superintendent, 368 U.S. 355, 82 S.Ct. 427

Congress made its intent to diminish the reservation clear when it declared, in Section 21 of the Act of March 2, 1889:

> That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain . . . (emphasis supplied)

Had Congress wished to diminish the Rosebud Reservation it could have employed language calculated to express such a wish clearly, as it had done previously. In view of:

1. the three specific provisos in the three acts preserving treaty benefits, such as an undiminished reservation,

2. the general principle that Indian treaty rights will be abrogated only by unequivocal Congressional language, and

3. the demonstrated capacity of Congress to use unequivocal language to disestablish a reservation and restore it to the public domain,

the failure of Congress to use such unequivocal language in any of the three acts cannot be considered inadvertant; these three factors can only be interpreted to mean that Congress did not intend that any of the three acts would disestablish or diminish the Rosebud Reservation.

In addition, the language of the Seymour Act which the Supreme Court expressly cites as evidence that Congress did not intend to diminish the Colville Reservation is nearly duplicated in the language of the three acts. That Court specifically cites Sections 2, 3, 6, and 12 of the Colville Act for this purpose in 368 U.S. 555, n. 11; 82 S.Ct. 427, n. 11. The language of the Seymour Act that the Supreme Court cites in support of an undiminished Colville Reservation consists of such phrases as "on said Colville Indian Reservation" (§2), "of the said . . . Colville Indian Reservation" (§3), "on the Colville Indian Reservation" (§6), and "of said . . . Colville Indian Reservation" (§12). Much the same language will be found in each of the three acts. The Gregory County Act includes such phrases as "of the Rosebud Indian Reservation", "on said reservation", "upon the reservation", and "upon said reservation", all in Article IV. The Tripp County Act uses language such as "within the Rosebud Reservation" (§2), "within said reservation" (§), "on the Rosebud Reservation" (§2), and "on the Rosebud Reservation" (§5). And the Mellette County Act employs phrases such as "on said reservation" (§1), "of the said Rosebud Reservation" (§2) "of the reservation" (§4), and "on the said reservation" (§7).

Therefore, since the United States Supreme Court cites the above language of the Seymour Act in support of the proposition that

> the 1906 [Seymour] Act repeatedly refers to the Colville Reservation in a manner which makes it clear that the intention of Congress was that the reservation should continue to exist as such . . . (368 U.S. 355; 82 S.Ct. 427),

then the nearly identical language in the three acts must support with equal force the proposition that the three acts repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist as such.

B. The Mellette County Act contains a phrase which renders Congress' intent regarding the future status of that portion of the Rosebud Reservation uncertain and therefore subject to the rule that doubtful expressions be resolved in favor of the Indians in statutes passed for their benefit.

As has been noted above at page 8 of this brief,

> statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.
> Alaska Pacific Fisheries v. United States, 248 U.S. at 89; 39 S.Ct. at 42 (1918)

The Mellette County Act is such a statute, passed for the benefit of the Rosebud Sioux. As Congressman Burke, the author of the Mellette County Act, stated during the debate over the bill on the floor of the House of Representatives, that

> this bill is in line--in fact, almost a duplication--of bills that have heretofore passed and become law, proposing to dispose of surplus and unallotted lands

> of the different Indian reservations of the country. . . . These lands were being sold by the government for the benefit of the Indians.
> Congressional Record, House of Representatives, 61st Congress, 2nd Session, Vol. 45, part 5, p. 5456, April 27, 1910.

This act contains a doubtful expression which, when considered in the light of the entire bill and of the legislative history discussed above, must be resolved in favor of the Indians. Section 1 of the Mellette County Act contains this clause:

> Provided, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation. (emphasis supplied)

Some may say that this isolated word is dispositive on the question of Congressional intent regarding this act. However, the Rosebud Sioux Tribe maintains that the dimunition referred to in the act is not a territorial dimunition of the reservation in the ordinary sense of the word, but rather a dimunition of the reservation only in the sense that the lands sold by the United States to settlers under the act would no longer be available to the Rosebud Sioux for future allotment or as a source of income, as they would have been but for this act. This is exactly the kind of use of language which Chief Justice John Marshall had in mind when he admonished all judges that:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.
> Worcester v. Georgia, 31 U.S. (6 Pet.) at 582 (1832)

This rule of construction should also be applied to the construction of statutes, when read in conjunction with Carpenter v. Shaw, supra, Red Bird v. United States, supra, and Alaska Pacific Fisheries v. United States, supra. These surplus and unallotted lands in Mellette County did not become part of the public domain because the Rosebud Sioux retained an equitable interest in those lands until and unless the entryman perfected his entry. See United States v. Brindle, 110 U.S. 688, 693; 4 S.Ct. 180, 182 (1884); Union Pacific Railroad Co. v. Harris, 215 U.S. 386, 389 (1910). The Supreme Court made this distinction clear in Ash Sheep Co. v. United States, 252 U.S. 159, 166; 40 S.Ct. 241, 243 (1920):

> when the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should have been made, any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee . . .

If patents had been obtained by fraud to any of these lands, an action for damages and cancellation of the patents would lie on behalf of the United States for the use and benefit of the tribe against the fraudulent parties, with the damages awarded to the tribe. United States ex rel. Creek Nation v. Rea-Read Mill & Elevator Co., 171 F. 501 (C.C.E.D.Okla., 1909) Further, prior to the perfection of entries, the tribe would enjoy the right to all income that might flow from the surplus and unalloted lands in Mellette County. Memo. Acting Sol. I. D. May 25, 1937; Cohen, op. cit., p. 335. Therefore, it is clear that the Rosebud Reservation was "diminished" by the

Mellette County Act not only by reducing the acerage available to the tribe for future allotments, but also by making it possible for entrymen to stop the flow of income to the tribe from the opened lands.

The Field Solicitor of the Bureau of Indian Affairs agrees with this interpretation of the word "diminished" in the Mellette County Act. His interpretation is entitled to "great weight" and "is not to be overturned unless clearly wrong". United States v. Jackson, supra, and Stevens v. Commissioner, supra. His memorandum, which appears in full in the appendix, states that

> a casual reading of such Act [i.e., the Mellette County Act] might cause improper significance to be attached to the words "on the diminished reservation . . . [p. 4]

He then cites several phrases in the same act which refer to the reservation in ways which suggest that Congress did not intend to diminish or disestablish the Rosebud Reservation by the Mellette County Act. These phrases include:

a. "on said reservation" (§1)

b. "within the portion of the said Rosebud Reservation" (§2)

c. "within that portion of the reservation" (§4)

In addition to these and other examples of language indicating a Congressional intent contrary to that which might be inferred from the phrase "on the diminished reservation", several other internal inconsistencies of the Mellette County Act also mitigate against the inference that Congress intended to diminish the Rosebud Reservation. If Congress intended to disestablish the

Mellette County portion of the reservation, why did it specifically provide land for

> agency, school, and religious purposes, to remain reserved as long as needed and as agency, school, or religious institutions are maintained thereon for the benefit of said Indians [?] [§1]

Why did Congress direct the Secretary of the Interior

> to issue a patent in fee simple to the duly authorized missionary board, or other authority, of any religious organization heretofore engaged in missionary or school work on said reservation . . . [§1]

if this land would no longer be part of the reservation? Why did Congress reserve timber lands "for the use of the Rosebud Indians" (§4) if these lands would be located off the reservation? And why did Congress specifically prohibit the introduction of intoxicants into Mellette County for twenty-five years just as if that county were Indian county if it were not part of the reservation? [§10]

Section 9 of the Mellette County Act requires that the $35,000 appropriated for the appraisal and classification of the opened lands

> shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

If Congress intended that Mellette County would no longer be part of the Rosebud Reservation, why did it impose on the Rosebud Sioux the cost of selling that which was no longer theirs? It would seem much more logical and in keeping with the fiduciary duty of the United States to conclude that the reason that Congress imposed this burden on the Rosebud Sioux

was that Congress recognized that the tribe still retained its beneficial interest in these lands while the United States acted only as trustee and real estate agent for them, charging them with the expenses of the sale directly, since there was no commission to which the agent could add his expenses. This analogy is entirely consistent with section 11 of the Mellette County Act wherein the United States stipulates that it acts only

> as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided.

A trustee is certainly entitled to deduct the necessary expenses in his administration of the trust from the amount that he pays over to the beneficiary. If, however, the corpus of the trust ever were the property of the trustee , that trustee would not be entitled to charge a party who was no longer the beneficiary with administration costs. Therefore, the fact that Congress charged the tribe with the expenses of the sale of the opened lands in Mellette County is yet another indication that Congress did not intend the Mellette County Act to diminish or disestablish any portion of the Rosebud Reservation.

Finally, Section 11 of the Mellette County Act provides that nothing in the act shall be construed to deprive the Indians of any treaty right unless "inconsistent with the provisions of this Act". Under the Treaty of 1868 and the Act of March 2, 1889 , the Cheyenne River Sioux were guaranteed a permanent reservation with a fixed boundary. This right cannot be abrogated by mere implication of a single equivocal

phrase in the Mellette County Act, under the aforementioned rule that intent to abrogate an Indian treaty right is not to be lightly imputed to Congress.[5]

The word to which the defendants may point as evidence of Congressional intent to diminish the reservation has been shown to be susceptible to, and was probably meant to have had, a meaning different than that which the defendants may advance. Under the rule that doubtful expressions are to be resolved in favor of the Indians, and in view of the many instances in the same act in which Congress expressed a clear intent not to disestablish or diminish the reservation, this lone doubtful island of language can hardly be dispositive of Congressional intent.

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[5] It should be noted that the absence of state jurisdiction in the area opened for non-Indian settlement is not inconsistent with either the expressed purpose of the three acts or with the historical circumstances which Congress had in mind when it passed them. Moreover, each and every act required to be done under the terms of the three acts could be done without necessarily diminishing the reservation. Also, the act contains no provision that would conflict with the proposition that the reservation was not diminished. This latter point is strengthened by the presumption in favor of the preservation of Indian rights in doubtful cases. Thus, the preservation of rights clause in Section 11 would offer its own basis for finding an undiminished Rosebud Reservation.

In the

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District of South Dakota, Western Division

CIV 72-4055

ROSEBUD SIOUX TRIBE,

Plaintiff,

v.

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Defendants.

BRIEF FOR THE FOUR COUNTIES

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ON THE BRIEF:
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INTRODUCTORY STATEMENT

> In order to understand Federal Indian law, a constant awareness of history must be maintained. The early pronouncements, such as those of Chief Justice Marshall, quoted in this treatise must be considered in the light of the historical situations then existing. There is a great expanse between the status of Indians as dependent nationalities in Marshall's time and their national citizenship today. Federal protection of tribal governments, which now exercise what are recognized simply as municipal powers, still survives, but not on the original basis.
>
> It has not been presumed that Congress has ever intended, or does intend, any fraudulent objective or any base act in its legislation in the unique field of Indian affairs. Courts presume that Congress acts in good faith and that presumption is adhered to in this revision. Further, it has been assumed that nothing could be more destructive of good will or more inimical to the advancement of which Indians are known to be capable than an immoderate accentuation of the idea that the United States Government is under a special obligation to all citizens who have Indian blood as a distinct class because of real or fancied injustices to their ancestors. In this connection it should be noted that there is a tendency to emphasize the obligations of the Government of the United States as trustee of the Indians and their rights. There is a related tendency in so doing to minimize the fact that it is also trustee of the rights of all the citizens and nationals of the United States. DEPT. OF INT., FEDERAL INDIAN LAW 2 (1958).

The Rosebud Reservation was opened by three acts: 1904, 1907 and 1910. Plaintiff seeks "declaratory judgment as to the effect of these acts on the size of the reservation." Answer for Plaintiff in reply to Counties' request to make more definite and certain, at 2 [hereinafter cited as A.P.]. The counties, not unaware of the recent decisions construing the effects of similar acts on other reservations, note that none of these decisions has been made in light of either an adequate legislative history of the particular act under consideration or the historical origin of the acts in general. As a result, the recent decisions have accepted a proposition similar to plaintiff's position that the acts "were not expressions of Congressional intent to diminish or alter the boundaries of the Rosebud Reservation." Brief for Plaintiff at x [hereinafter cited as B.P.]. It is the counties' position that neither the Seymour nor the recent opinions constitute any sort of a mandate for this court to rule in the tribe's favor if this court is convinced, and that conviction is soundly based upon probative evidence of congressional intent, that Congress, by the passage of the three Rosebud acts, intended to diminish the Rosebud Reservation.

As Justice Frankfurter once stated:

> Indian law is a vast hodge podge of treaties, judicial and administrative rulings, and unrecorded practices in which the intricacies, the perplexities, the confusions and injustices of the law governing Indians lay concealed.

Compounding this complexity is the fact that the court has been asked to ascertain precisely what effect a congressional delegation legislating in the first decade of the 20th century intended certain acts to have on the size of the Rosebud Reservation. In this respect the usual "vantage point of time" is in actuality a serious disadvantage, and with this in mind, the counties have attempted to reconstruct the situation as it existed in the early 1900's with the aid of:

1. The text of the three acts;
2. The Senate and House Documents;
3. The Congressional Record;
4. The transcripts of the negotiation sessions;
5. Correspondence and reports from the Department of Interior and the Commissioner of Indian Affairs; and,
6. Later statutes, state historical documents and reports of the Rosebud Indian Agents.[1]

The counties realize the limited probative value of some of these materials, but have nevertheless included them in order to recapture the tenor of the period. This tenor represents, in effect, the counties' theory in this action. In this respect, we would urge the court not to place too much emphasis or significance on any one word or sentence in any of this material. Congressional intent can be a very illusive concept. For example, the following quotation appears in plaintiff's brief at page 15

> [T]his bill is in line--in fact, almost a duplication--of bills that have heretofore passed and become law, proposing to dispose of surplus and unallotted lands of the different Indian reservations of the country . . . [T]here are two propositions to be considered in disposing of the unallotted and unused lands on Indian reservations. One is, at the earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms . . . [This] will have the effect of civilizing the Indians who have allotments and also give value to these allotments which at present are of very little value . . .In addition to that, just as soon as these reservations are opened up and settled[,] railroads usually come in and thereby give greater value to the lands owned by the Indians. B.P. at 15.

Apart from the fact that this is one of only three isolated references to the Congressional Record or Senate and House Documents in plaintiff's entire brief, the quotation is illustrative of two other factors of which the court should be aware.

In the first place, to cite this statement for the proposition that "Contemporary history indicates that Congress did not intend the three acts to operate to diminish the Rosebud Reservation" (B.P. at 14) is highly questionable--at least in the <u>form</u> presented in plaintiff's brief. Congressman Burke actually stated:

> Mr. Burke of South Dakota . . . . I might say, Mr. Speaker, that there are two propositions to be considered in disposing of the unallotted and unused lands on Indian Reservations. One is, at the earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms, <u>AND I BELIEVE THAT THE PLACING THROUGH WHAT WERE HERETOFORE RESERVATIONS</u> actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of very little value. 45 Cong. Rec. 5457 (1910) (emphasis added).

The court will note how, by the use of three small dots and the deliberate omission of several very important words, the tenor of an entire paragraph can be destroyed.

Secondly, and more importantly, the correct quotation is illustrative of an even greater problem.

---

1. The counties have relied primarily on the contemporary documents of the period; the bulk of the material presented in this brief is from pre-1910 sources, with some material dating up to 1920. It is the counties' position that <u>this</u> is <u>the</u> period from which the intent of Congress should be gleaned. The direction or purpose of "Indian Policy" fluctuated in later decades and for this reason the counties have been somewhat reluctant to accept any later reference at face value unless that reference could be substantiated in the documents of the period to which it referred. In this respect, the counties have followed the mandate of Tacitus . . . "Refer everything back to its own year."

Many of the materials with which the court will be presented contain references to "on," "in," and "within," such as the "on" in the above quotation. Initially, one might equate the "disposing of the unallotted and unused lands <u>on</u> Indian Reservations" with the continued existence of the reservation. Yet, shortly thereafter, is an unequivocal reference to the placing of settlers "through what were <u>heretofore</u> reservations." By itself, the paragraph might seem ambiguous and confusing; but when viewed as an integral part of other material of the period, the tenor of the entire paragraph clearly emerges and this is the counties' point. Unless these materials are placed in their proper context <u>and viewed in their entirety</u>, the crux of nearly a decade of Indian legislation intended by Congress to extinguish certain portions of the Rosebud Reservation will be for naught, much to the detriment of the non-Indian settlers and their descendants, who will nearly sixty years later suddenly find themselves within the exterior boundaries of a reservation and subject to a tribal jurisdiction, the limits of which plaintiff does not even care to expound upon at this time.

The counties agree with plaintiff that the exact powers of the Rosebud Sioux Tribe are not in litigation at this time and for this reason a discussion of these powers has not been presented in this brief. However, it is interesting to note that even the cursory list appearing in plaintiff's answer to the counties' motion for a more definite statement does not appear anywhere within plaintiff's brief. Since plaintiff is asking this court to declare, in effect, that the counties are within the Rosebud Reservation and therefore subject to these tribal powers, the counties think some mention should be made of the scope of this tribal jurisdiction. Plaintiff's list will suffice for this purpose:

(a) Criminal Jurisdiction, <u>Smith</u> v. <u>Temple</u>, 152 NW2d 547, 548
(b) Civil Jurisdiction, <u>Smith</u> v. <u>Temple</u>, supra
(c) Sales tax authority, attached memorandum of the South Dakota Department of Revenue and within this area the Rosebud Sioux tribe and the United States would have jurisdiction to the exclusion of the defendants
(d) Tribal taxing authority, <u>Iron Crow</u> v. <u>Oglala Sioux Tribe</u>, 231 F2d 89
(e) Tribal regulation of intoxicants, 28 USCA Section 1161

A.P. at 2.

It is the counties' position that Congress, by the passage of the three acts, intended to separate and remove the counties from the Rosebud Indian Reservation in such a manner that they would never again be considered to be either within the exterior boundaries of the reservation or subject to whatever powers the Rosebud Sioux Tribe might lawfully exercise therein. The purpose of this brief is to present to the court probative evidence of that intent.

1904 ACT[2]

I. THE GENESIS OF THE 1904 ACT

A. THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

The Rosebud Reservation was created by the Act of 1889. Although it was stated in the preamble that this was to be a "permanent" reservation, Section 12 therein provided:

> Sec. 12. That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which said reservation is held of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress: Provided, however, That all lands adapted to agriculture, with or without irrigation, so sold or released to the United States by an Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers, and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education . . . . Act of March 2, 1889, Section 12, 25 Stat. 888 (emphasis added.)

In early 1901 Inspector James McLaughlin, acting pursuant to Section 12 and at the request of the Department of the Interior, concluded an agreement with the Indians for an outright lump-sum cession of the surplus portion of the Rosebud Reservation lying within Gregory County. As plaintiff states in its brief, this agreement was of "a time when a completely different policy prevailed in Indian land acquisitions." B.P. at 29.

Since the entire tenor of this part of plaintiff's brief indicates a concession of the effect this agreement would have had on the size or boundary of the Rosebud Reservation had it been immediately ratified by Congress (B.P. at 29 - 30)[3], the counties will only summarily refer to the transcript of the 1901 negotiations wherein Inspector McLaughlin stated:

> By disposing of this corner of the reservation it would leave you a nice square reservation . . . .
>
> It will leave you about the same sized reservation as the Pine Ridge Indians have . . . .
>
> The cession of Gregory County will leave your reservation a compact almost square tract, and would leave your reservation about the size and area of Pine Ridge reservation . . . .
>
> Every person would have the previlege [sic] of remaining on the land that has been allotted to him, or of relinquishing it and removing to the diminished reservation, but I would advise you who have selected tracts of land to remain upon your allotments in case of the cession of this land to the Government . . . .
>
> Negotiating for this corner of the reservation . . . .
>
> In negotiating with Indians for tracts of land, a portion of which has been allotted to them, the privilege has been given the Indians to elect whether they shall remain upon their allotments or relinquish their allotments and remove to the reservation. I do not think that it is

[2] Act of April 23, 1904, 33 Stat. 254–A portion of Gregory County. A detailed history of the openings of the Rosebud Reservation appears in 18 S.D. L. Rev. 85 (1973). The counties will use the same chronological approach appearing therein, although in a summary fashion, in this brief.

[3] If plaintiff wishes to change its position as to the necessary effect the original 1901 lump-sum cession agreement would have had on the size or boundary of the Rosebud Reservation, the counties respectfully request leave to submit additional material on this point to the court.

> for the best interest of the Indians at any time to vacate their allotments. The lands that you have taken are, of course, the best lands of this county, and it is very doubtful if you could find as good land anywhere within the diminished reservation for the reason that the best lands have all been allotted . . . . Department of the Interior, Office of Indian Affairs, Transcripts of Councils with the Indians of the Rosebud Reservation by Inspector James McLaughlin, April and September, (1901) (emphasis added) [hereinafter these transcripts are cited as C.T.].

As for the agreement itself, only two provisions merit any discussion at this point and their significance will not become fully apparent until later in the brief.

The School Land Provision. South Dakota's enabling act provided that:

> Nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain. Act of February 22, 1889, ch. 180, 25 Stat. 676 (emphasis added).

If the original 1901 lump-sum cession agreement had been ratified, the reservation would have been "extinguished" and the land restored to the "public domain." The Indians would have been left with what Inspector McLaughlin referred to as a "nice square reservation." So on the first day it was presented on the floor of the Senate for ratification, Senator Gamble immediately proposed, and the Senate immediately agreed to, without discussion, the following amendment:

> The next amendment was, at the end of the bill, to insert the following as a new section:
>
> SEC. 4. That sections 16 and 36 of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools, and the same are hereby granted to the State of South Dakota for such purpose; and in case either of said sections, or parts thereof, of the lands in said county of Gregory is lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied, in quantity equal to the loss, and such selection shall be made prior to the opening of such lands to settlement.
>
> The amendment was agreed to. 35 Cong. Rec. 3187 (1902).

This same provision also appears verbatim in the three final acts of 1904, 1907, and 1910. Plaintiff has merely noted that the school lands were exempted from sale and/or disposition and has not offered the court one word of explanation why Congress thought it necessary to incorporate this provision into the three acts, which plaintiff would like the court to declare " did not diminish the Rosebud Reservation" (B.P. at ix), from an agreement which plaintiff concedes could have only diminished the reservation. Perhaps plaintiff wishes the court to think of this as just another instance in which "Congress can be excused from employing language suggested by another and echoing an abandoned policy" (B.P. at 30), but in this instance the court would not only have to excuse the language but also the underlying reasons given in the Congressional Record and Senate and House reports as well. The counties will cite and discuss these references later in their proper sequence.

2. The "Preservation of Rights" [Benefits] Provision. Article V of the original 1901 lump-sum cession agreement provided:

> It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement. S.Doc. 31, 57th Cong., 1st Sess. 42 (1901).

But for the sophisticated argument which plaintiff has founded upon the presence of this "crucial" (B.P. at 41) provision in the three final acts, the counties would hardly have thought it worthy of any comment whatsoever and would have therefore treated it in the same manner as Congress did.

Undoubtedly, the provision was intended to guarantee the preservation of Indian benefits, but to argue from this premise to the premise that "one of the prime benefits to which a tribe is entitled is surely that of a secure reservation with a fixed boundary" (B.P. at 42), and finally conclude that the original 1901 lump-sum cession agreement would not have diminished the Rosebud Reservation, would be almost patently absurd--in light of the material that is now available concerning the negotiation and congressional treatment of the agreement. It will be the counties' position throughout the remainder of this brief that plaintiff's sophisticated argument based upon this "crucial" provision in the three acts is equally untenable--when viewed from a proper historical perspective and in light of the material hereinafter presented.

B. THE TRANSITION PERIOD: 1902 - 1904

It is during this time period, at least as far as the Rosebud Reservation is concerned, that Congress changed the type of arrangement it would use in acquiring Indian lands. The agreement of 1901 was amended, and as such, finally emerged as the Act of 1904. The counties agree with plaintiff that as to the Rosebud Reservation, "the Gregory County Act would establish a new policy." B.P. at 30 (emphasis as is original). We also commend plaintiff for its quotation from such an excellent source of legislative history as the House of Representatives Report No. 443 appearing at 29 of plaintiff's brief:

> Both of these bills [i.e., both the House and Senate versions] present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement . . .
>
> This bill provides that the lands shall be disposed of under the homestead laws by the settler paying therefor and the proceeds paid to the Indians, and it is expressly provided by Section 6 of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or dispose of the same except as provided, or to guarantee to find purchasers for said lands, it expressly stating that the intention of the act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale thereof only as the same are received. B.P. at 29 - 30.

But we do not agree that this singular quotation can realistically be cited to support the proposition that it alone is either sufficient "legislative history" to "dispel" any confusion or cause such "ambivalence" to render the "language of the act subject to the rule . . . that doubtful expression in treaties and statutes dealing with Indian affairs must be resolved in favor of the Indians." B.P. at 31. This is especially so in view of the paragraph appearing on the very next page in the same report:

> There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation in South Dakota. H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904) (emphasis added).

Rather, the position of the counties will be that this act in fact diminish the Rosebud Reservation

in precisely the same manner which would have occurred had the original 1901 lump-sum cession agreement been ratified. The following interrelated propositions will be utilized to support the counties' position.

II. THERE IS NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE "NEW POLICY" WAS INTENDED TO AFFECT THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE ONLY REASON FOR THE "NEW POLICY" WAS AN APPROPRIATION CONFLICT WHICH WAS NOT IN ANY WAY CONCERNED WITH THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

IV. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE AMENDED 1901 CESSION AGREEMENT (1904 ACT) WAS INTENDED TO EFFECT THE SAME DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

V. THE DOCUMENTS AND STATUTES CONCERNED WITH GREGORY COUNTY AFTER THE PASSAGE OF THE 1904 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED

II. THERE IS NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE "NEW POLICY" WAS INTENDED TO AFFECT THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

If the 1904 Act was not intended to diminish the Rosebud Reservation as the original 1901 lump-sum cession agreement would have, where in any of the contemporary documents is there any reference to this fundamental policy change? Plaintiff's brief certainly does not contain any citations to support what would have to be referred to, at least as to the Rosebud Reservation, a rather drastic reversal in policy within a period of two years.

Here, in the documents of this period, not in the 1930's, 1940's or the 1970's, is where the metal of plaintiff's concept should be put to the test. Certainly, in the approximately 200 pages of material specifically dealing with this particular reservation and the 1904 Act, there should have been one paragraph which would at least arguably support plaintiff's position.

But it is not the counties' position that the absence of any evidence to support plaintiff's position should, of itself, be determinitive of the issue of what effect the 1904 Act had on the size of the Rosebud Reservation--for there is ample evidence which should suffice to that end.

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE ONLY REASON FOR THE "NEW POLICY" WAS AN APPROPRIATION CONFLICT WHICH WAS NOT IN ANY WAY CONCERNED WITH THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

A. THE CONGRESSIONAL RECORD

Approximately 50 pages of the Congressional Record now record the heated debate that took place on the floor of the Senate in March and April of 1902. The sole subject of this debate was the ratification of the original 1901 lump-sum cession agreement and the appropriation "policy" for which

it stood:

> Mr. GAMBLE . . . . It has long been the policy of the Government to open the Western reservations to free homes. The homestead law enacted so many years ago certainly proved of inestimable value, not only to the West, but to the country at large. A different policy was inaugurated some ten or twelve years ago, under which, when reservations were opened, the settler was obliged to pay the same price for the land that the Government paid the Indians for the relinquishment of their title.
>
> Two years since a free-homes bill was passed by Congress after having been discussed at great length, especially in this body. It occurs to us that by that act the homestead policy has been reestablished [sic] by the Government . . . .
>
> Mr. STEWARD . . . . If the Government pays $1.25 an acre for the land, and that is all the Indians ought to demand, then I should be in favor of opening it to free homesteads, but I am not in favor of paying the Indians a price which is fixed by the value of adjoining land held by white men, and then opening it to free homes, because before we get through with it we shall find that it will involve a vast amount of money.
>
> I make these observations so that the situation may be understood by the Senate. If Congress adopts the policy of fixing the price of land to be opened and not leave it to the Indians, then we can open it to free homesteads for such price as will be reasonable; but if we leave it to the Indians to fix the price, under the advice of white men around there, then it will become so extravagant that the scheme can not be carried out.
>
> Mr. PLATT. . . . It is true that several years ago--more than ten years ago, I think--in opening Indian reservations, we paid large and extravagant prices for land to the Indians, upon the theory that the Government was going to be reimbursed for its expenditures by the settlers paying for the land which they settled upon a sufficient sum to reimburse the Government. That went on for years, and everybody supposed that that was acceptable to the settlers. Then the settlers began to agitate that the Government should remit to them the obligation which they had incurred to pay for the land, and thereby reimbruse the Government; and the history of that agitation of course is well known. The Government remitted about $35,000,000 which it had paid to the Indians and which the settlers had agreed to repay to the Government by the passage of that free-homes bill. 35 Cong. Rec. 3187, 3188 (1902).

The bill continued to be sporadically debated and was passed over into April:

> Mr. PLATT of Connecticut. . . . The question is whether the Government, in opening the lands to settlement, shall give the lands thus purchased from the Indians to the settlers under the homestead law, or whether it shall require the settlers who take up these lands under the homestead law to pay for them a sum per acre equivalent to what the Government pays the Indians for them. In other words, in opening the Indian reservations which already remain, what is to be the policy of the government? Are we to pay the Indians a high price for the lands which we obtain a cession of, and then give those lands to the settler free of cost, or shall we require the settlers to pay as much for the lands as will make up wholly for the amount which we have paid for them? That is the question, and Senators will see that it is a far-reaching question.
>
> I do not know how many million acres still remain in Indian reservations which must in the future be opened to public settlement, but there are many millions, and, at the rate we have been paying the Indians under the agreements made with them for such lands, the amount to be expended in the not very distant future will run up into the millions . . . .
>
> Now, this particular agreement comes here to be ratified upon a payment to the Indians of about $2.50 an acre for the surplus lands within their reservation which are under the agreement to be ceded to the United States and become part of the public domain. The Indians in negotiating said that was not a fair price for the lands and they were worth a great deal more, but finally the negotiation was concluded. The agreement comes here. So far as the Senate considers it, it is an agreement to open a reservation--to pass ordinarily without any particular examination or any thought of the consequences to the Government in the matter of expense. I will not go into the history of the negotiations as to these lands, but the price paid or agreed to be paid to the Indians is $2.50 an acre for the entire acreage which is to be brought under the public domain by cession to the United States.

> The bill proposes that the land thus acquired shall be open to homestead settlement without requiring any payment for the land settled upon from the settler. My amendment proposes that the settler shall pay $2.50 an acre, being the same which the Government has agreed to pay to the Indians, and that thus the Government shall be reimbursed for the amount expended for the purchase . . . . Cong. Rec., supra, at 4801, 4802.
>
> Mr. CLAPP. . . . Here is this reservation in South Dakota. Of course the Senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation, as a matter of progressive Indian policy, for the purpose of separating the Indians and extinguishing the reservation or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that land is primarily and inherently worth so much an acre. Cong. Rec., supra at 4807.
>
> Mr. DUBOIS. . . . I am opposed also to giving the Indians money directly. That is a new policy, a policy of recent years. It does more to demoralize the Indians than anything else. It does them no good. The proceeds of this land, when it is appraised and sold, should be put aside for the benefit of the Indians.
>
> Mr. TILLMAN. Mr. President--
>
> Mr. DUBOIS. Excuse me for just a moment. Then the land should be thrown open to homestead settlers. In some instances, of course, you will find reservations near towns and cities or for some other reason where the lands will be very valuable. In that case the agents of the Government could fix the lowest price at which the lands should be sold, and in an extraordinary case of that sort you could reimburse the Government and give the balance of it to the Indians.
>
> Now, generally that would be my policy, and I think we have about come to the time when we should cease to go through the farce of treating with the Indians. Every Western man and some Eastern men who are familiar with it, like the Senator from Connecticut [Mr. PLATT], know this to be true. I stated it yesterday, and I will state it again. When a commission is sent out to treat with Indians for a cession of their land there is a pressure from all sides to get any sort of an agreement, no matter what it is. The Indians are pretty cunning. They understand that and put the price up way beyond what the land is worth or ever will be worth, and they insist now in addition in these later days that the money shall be paid to them directly. I think it ought to be stopped. Cong. Rec., supra at 4860 - 4861.

Although Senator Gamble prevailed in the Senate, the bill was never actually debated in the House. The provision that was ultimately decided upon was the trustee-homestead provision, the origin of which can be detected in the last comment of Senator Dubois.[4]

In any event, that this appropriation conflict was the sole reason for the "new policy" is readily supported by the language appearing in the Congressional Record after the amendment had been made.

> Mr. GAMBLE. At the last session of Congress this bill was passed with the free-homes provision, which was insisted upon here. It has met with serious objection in the other House, and can not be carried through there. The bill has been amended to meet those objections; and we prefer to have the bill passed in its present form. Should the bill go to the other House containing the free-homes amendment, it would meet the fate of the bill passed last year. We are very anxious to have this bill in its present form. The delegation of the State of South Dakota is satisfied with it under existing conditions, and I trust no objection will be interposed by the Senator from Idaho. 36 Cong. Rec. 2748 (1903).
>
> Mr. BURKE. Mr. Speaker, this bill provides for the opening to settlement of 416,000 acres of land, now a portion of the Rosebud Reservation, in South Dakota, being that

[4] Although the courts have not been able to determine the precise origin of the trustee-homestead provision as such, it appears to have been formulated by one of the Committees on Indian Affairs after May 1, 1902, and before February 1, 1903.

portion of the reservation in Gregory County. In 1901 a treaty was entered into with the Rosebud Indians on the part of the United States, by which the Indians agreed to sell to the Government this land for $2.50 per acre. That treaty was transmitted to Congress, and because of the fact that it provided that the Government should pay for the lands outright and then take the chance of the Treasury being reimbursed by disposing of the lands to settlers, it never got further than through the Committee on Indian Affairs, which unanimously reported it favorably. It was never given consideration in the House.

Toward the concluding days of the last session of Congress a new bill was prepared, substantially as this bill now provides, and that bill provided that the lands should be ceded by the Indians to the Government, disposed of to settlers under the provisions of the homestead law, the price to be fixed at $2.50 an acre, as was provided in the original treaty. That bill did not receive consideration in the last Congress because of lack of time, but during the summer that bill was submitted to this tribe of Indians for their acceptance, and forty-eight more than a majority consented to accept the terms of that bill. This bill is substantially the same as the bill which I have just referred to, except that the committee, in view of a suggestion made by the Commissioner of Indian Affairs, in which he said he had no objection to the passage of this bill provided the Indians were insured of as much money as they would have received under the treaty, instead of fixing the price at $2.75, which was provided in the bill submitted to the Indians during the summer, fixed the price at $3 per acre for all lands taken within the first six months and $2.50 for all lands taken thereafter.

It was thought by the committee that this would certainly insure to the Indians as much money as they would have received under the original treaty, and, in my judgment, it insures their receiving considerably more. There is no opposition to the passage of this measure, so far as I know. The Indian Bureau and the Secretary of the Interior have both approved it, providing we fix a price, as we have done, that will insure the Indians as much money as they would have received under the original treaty. The Committee on Indian Affairs has considered it fully and at length and has spent several meetings of the full committee considering it. The report of the committee is unanimous. I do not care to occupy the attention of the House in making any extended remarks on the bill, and unless some gentleman desires to ask some questions I will reserve the balance of my time. 38 Cong. Rec. 1423 (1904).

B. THE SENATE AND HOUSE DOCUMENTS

Precisely the same explanation for the trustee-homestead amendment is also stated in all six of the Senate and House Reports. Before the trustee-homestead amendment:

> The committee have amended the bill, striking out the provision relative to "free homesteads," thereby proposing to open the land to settlement under the homestead and town-site laws, and requiring the settlers to pay for the land at $2.50 per acre, thus reimbursing the Government for the amount paid to the Indians. H.R. Rep. No. 954, 57th Cong., 1st Sess. 1-2 (1902).
>
> The Committee on Indian Affairs, to whom was referred the bill (S. 2992) ratifying an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation to carry the same into effect, having had the same under consideration, recommend that the bill be amended by striking out all after the enacting clause and inserting the bill H.R. 9057 as reported to the House (Report No. 954). The effect of this amendment is simply to substitute the House bill for the Senate bill, the only material difference in the bills being that the Senate bill contains a provision for "free homesteads," . . . . H.R. Rep. No. 2099, 57th Cong., 1st Sess.1 (1902).

After the trustee-homestead amendment:

> The agreement made with the Indians provided that the United States should pay for the land at the rate of $2.50 per acre, $250,000 of the amount to be expended in the purchase of stock cattle for the benefit of the Indians and the balance to be paid per capita in cash in five annual installments.
>
> A bill for the ratification of this treaty and opening the lands to settlement and entry was reported by this committee favorably. A similar bill passed the Senate, was referred

> to this committee, and was also unanimously reported, and both bills have been upon the Calendar of the House for passage for some time. The present bill proposes to adopt a new policy in acquiring lands from the Indians, and it provides that the lands shall be disposed of to settlers under the homestead and town-site laws, and to be paid for by the settlers, and the money to be paid to the Indians only as it is received in payment for the land from the settler. H.R. Rep. No. 3839, 57th Cong., 2d Sess. 1-2 (1903).
>
> [The Senate Committee on Indian Affairs adopted House Report No. 3839] S. Rep. No. 3271, 57th Cong., 2d Sess. (1903).
>
> The agreement, as made with the Indians, provided that the United States should pay for the land at the rate of $2.50 per acre, and from the proceeds $250,000 was to be expended in the purchase of stock cattle for the benefit of the Indians, and the balance was to be paid per capita in cash, in five annual installments. A bill for the ratification of this treaty and opening the land to settlement was transmitted by the Secretary of the Interior to Congress in the first session of the Fifty-seventh Congress. This bill provided simply for a ratification of the treaty and that the lands were to be disposed of under the provisions of the homestead law at $2.50 per acre.
>
> The bill was reported by this committee and was also favorably reported by the Committee on Indian Affairs in the Senate and passed the Senate. It appearing that the House was opposed to the passage of the same a new bill was presented late in the second session of the Fifty-seventh Congress, substantially the same as the present bill now under consideration, which was favorably reported by this committee, but too late in the session to have consideration in the House.
>
> Both of these bills present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement, and if not immediately, ultimately, under the provisions of what is known as the free-homestead act. H.R. Rep. No. 443, 58th Cong., 2d Sess. 1-2 (1904).
>
> [The Senate Committee on Indian Affairs adopted House Report No. 443.] S. Rep. No. 651, 58th Cong., 2d Sess. (1904).

C. THE TRANSCRIPTS OF THE 1903 NEGOTIATIONS

Finally, the same explanation also appears throughout the transcript of the 1903 negotiations, which were conducted after the amendment was in its final form:

> . . . There has been a sentiment growing in Congress for a number of years past, and is now stronger than ever, against paying Indians for ceded lands direct from the U.S. Treasury. That is what is referred to in my letter of instructions, which I read to you, as being a new departure in the manner of disposing of the surplus lands of Indian reservations, and instead of paying Indians direct from the U.S. Treasury as heretofore for their surplus lands; they will be paid from the proceeds of the sale of lands ceded; the Department thus acting as trustee for the Indians, and the Interior Department having charge of the lands will dispose of them in such manner as will secure to the Indians the highest price obtainable. This is the new departure referred to, and I believe, my friends, that no treaty will ever again be made with Indians, by which they will receive a lump sum consideration for the tract ceded . . . . I am here to try to enter into a new agreement, from which you will receive as much for your lands as the agreement of two years ago provided, but the manner of disposing of it is different . . . . The Government collects from the homesteader and pays it over to you . . . . You will still have as large a reservation as Pine Ridge after this is cut off . . . . C.T. at 5, 12, 22 (1903).
>
> The objections to the former agreement was not on account of the price, but to the manner of payment . . . . C.T. at 50 (1903).
>
> . . . The agreement which I submit for your consideration is similar in every respect to that of two years ago, except you will have to wait for the sale of the land to receive your money . . . . C.T. at 37 (1903).

The Indians themselves understood that the amended agreement simply meant, as Ghost Bear stated, that "the Great Father" was not going to "pay for the land himself." C.T. at 41 (1903). For the Congress, Inspector McLaughlin and the Indians, this was the only "new policy"—an amendment which represented a feasible solution to the opposition's appropriation argument and which was not in any way concerned with the diminution of the Rosebud Reservation which would have followed the ratification of the original 1901 lump-sum cession agreement.

IV. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE AMENDED 1901 CESSION AGREEMENT (1904 ACT) WAS INTENDED TO EFFECT THE SAME DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

A. CONTINUITY

1. Brief for Plaintiff. At 29 of plaintiff's brief the following statement appears: "The Gregory County Act incorporates this language verbatim, as it does the entire text of the 1901 agreement." B.P. at 29. Although the counties prefer to refer to the Gregory County Act as the amended 1901 lump-sum cession agreement, for that is what the 1904 Gregory County Act is, we agree with plaintiff that the text of the agreement is there. But we do not agree that the presence of the entire text of the original 1901 lump-sum cession agreement (except for the 1901 appropriation provisions) can be rationalized away, as plaintiff has attempted, by merely stating that "certainly Congress can be excused from employing language suggested by another and echoing an abandoned policy in its very first attempt to implement a new policy." B.P. at 30.

Nor do we agree with plaintiff that "Congress exhibited an understandable ambivalence an [sic] confusion in the Gregory County Act over exactly what language would be most appropriate to express the workings of the new land aquisition policy"; that plaintiff's isolated quotation of Senator Burke's report is sufficient "legislative history" to dispel any "confusion" or "ambivalence",[5] or that such ambivalence "renders the above language of the act" [the entire 1901 agreement, as incorporated??] subject to any rule of construction of resolving anything in favor of the Indians. B.P. at 31. Rather, it is the counties' position that Congress only amended the 1901 agreement to the extent necessary to implement the new policy and did not intend to change the other aspects of the agreement in any way.

For example, the format of the bill itself, as introduced by Congressman Burke to the House on January 30, 1904, was:

> The Clerk read the bill, as follows: A bill to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect.
>
> [entire text of 1901 Agreement]

[5] The merits of plaintiff's selected legislative history were noted in the introduction of this brief and at 13, supra.

> Therefore,
> Be it enacted, etc., that the said agreement be and the same hereby is, accepted, ratified and confirmed as herein amended and modified.
>
> [1901 Agreement as amended and modified]

38 Cong. Rec. 1422-1423 (1904).

It is the counties' position that the mere fact that Congress did use not only the language of an "abandoned" policy, but the entire text of an "abandoned" agreement, would in and of itself, seem to be indicative of a continuity of policy as amended, and not as plaintiff would have the court believe, congressional incompetency.[6]

On this same point the Court will also have to excuse President Roosevelt, for as plaintiff states at 25:

> He employed language in that proclamation which nearly duplicated the language which Congress used in the Act of April 23, 1904. From this language, one might infer that Roosevelt did contemplate a diminished Rosebud Reservation. B.P. at 25.

2. The Senate and House Documents. Even the Senate and House Reports on the 1903 and 1904 acts, which are discussed in detail in other parts of this brief, not only treat the original and amended 1901 agreement in this same fashion, but also amend and make a part of each report, several of the 1901 documents in their entirety.

3. The Congressional Record. If one were to choose almost any page in the Congressional Record before the amendment of the original 1901 lump-sum cession agreement and compare the terminology appearing therein to that used after the agreement had been amended, he would note that the Congressmen continued in all instances to refer to the subject matter with which they were concerned in exactly the same descriptive terminology. In this connection, it is also interesting to note that both plaintiff and some of the recent opinions seem to attach some sort of mystical significance to the "opening" or "opened reservation" terminology and in some manner equate this terminology with the new trustee-homestead provision which supposedly "opened" the reservation without diminishing the size or boundary of that reservation. Yet, at least with respect to the Rosebud Reservation, this simply is not the case. This "opened" reservation terminology was used not only by nearly every member of Congress participating in the debates from the first day the original 1901 lump-sum cession agreement was introduced:

> Senator GAMBLE. . . . It has long been the policy of the Government to open the western reservations . . . . Within the limits of the lands proposed to be opened to settlement there are upward of 450 Indian allottees, and the settlers who take these lands

[6] Plaintiff's position becomes even more of an anomaly when one considers the expertise of South Dakota's congressional delegation. The dominant members were Senator Robert J. Gamble and Congressman Charles H. Burke. Senator Robert J. Gamble was elected to the United States Senate in 1900. He remained in that office until 1912, and was very active in all legislation concerning Indian lands during that period. Charles H. Burke was elected to the House of Representatives in 1900. He remained in that office until 1914 and later served for several years as Commissioner of Indian Affairs.

These two gentlemen had many things in common:

(1) Both served on the Indian Affairs Committees in their respective houses.
(2) Both authored considerable legislation affecting Indians and Indian lands, including all three Rosebud Acts.
(3) Both submitted the committee reports concerning the legislation discussed herein to their respective houses.
(4) Both were members of the congressional delegation before the Rosebud Reservation was diminished.
(5) The materials herein indicate that both understood the so-called "Crook Treaty," and were aware of its relation to the later acts.
(6) One or the other of these men introduced the bills discussed herein.

> will be obliged to assume the responsibilities of the local community practically unaided by the Indians, and to bear largely all the responsibilities that have heretofore been borne by the General Government . . . .
>
> Mr. STEWARD. . . . In this very case the committee had much doubt whether the land was worth $2.50 an acre; but they finally consented to report the bill, because the Senator from South Dakota insisted that it would be detrimental and ruinous to the State of South Dakota to have settlement there tied up in this way, and that these lands ought to be opened . . . .
>
> Mr. PLATT. . . . It is true that several years ago—more than 10 years ago I think—in opening Indian reservations, we paid large and extravagant prices for the land to the Indians. . . . 35 Cong. Rec. 3187, 3188 (1902) (emphasis added).

but also appears throughout the congressional documents and debates before the turn of the century in connection with other pure lump-sum cession agreements.

4. The Office of Indian Affairs. As further indication that the trustee-homestead amendment was not intended to affect the diminution aspect of the original 1901 lump-sum cession agreement, reference is made to the manner in which the Office of Indian Affairs handled the amendment. Inspector McLaughlin's new instructions simply explained it and then stated:

> It is not deemed necessary herein to give you any definite instructions as to the form of the agreement and the manner of its execution inasmuch as you are thoroughly familiar with these features of the subject. Attention is invited in this connection, however, to Departmental instructions to you dated March 21, 1901, in connection with the negotiation of the former agreement. Letter from W.A. Jones, Commissioner of Indian Affairs to Inspector James McLaughlin, June 30, 1903 (emphasis added).

Inspector McLaughlin explained the trustee-homestead amendment to the Indians in the same manner: "I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment . . . ." C.T. at 21 (1903).

B. THE SCHOOL LAND PROVISION

In addition to the above references to a continuity in policy, there is one particular provision that the counties think deserving of more analysis than it has received in plaintiff's brief, or for that matter, in any of the briefs submitted in the recent cases: the school land provision.

Thus far, the only treatment this school land provision has received in any of the briefs is a mere acknowledgement of its presence. For example, plaintiff merely lists the provision in the "Lands exempted from sale and/or disposition" and "appropriations" sections of its brief. B. P. at 31-33, 41. But for the reasons stated in the Congressional Record and the Senate and House documents for its necessary inclusion in the original and amended 1901 agreement, no other treatment would probably have been warranted. When the provision is examined in light of these reasons, however, it is the counties' position that it assumes such an added degree of significance as to constitute one of the most enlightening provisions to be found in any of the acts.

On the first day the original 1901 lump-sum cession agreement was presented on the floor of the Senate for ratification, Senator Gamble immediately proposed, and the Senate immediately agreed to, without discussion, the following amendment:

> The next amendment was, at the end of the bill, to insert the following as a new section:
> SEC. 4. That sections 16 and 36 of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools, and the same are hereby granted to the State of South Dakota for such purpose; and in case either of said sections, or parts thereof, of the lands in said county of Gregory is lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied, in quantity equal to the loss, and such selection shall be made prior to the opening of such lands to settlement.

The amendment was agreed to. 35 Cong. Rec. 3187 (1902).

Senator Gamble then explained the reason for its inclusion to the Senate:

> Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the lands restored to and became a part of the public domain. This would withdraw about 29,000 acreas of these lands and would leave 387,000 acres to be opened to settlement, and which would be affected by the proposed amendment. Cong. Rec., supra (emphasis added).

The provision of the enabling act to which Senator Gamble referred provided:

> Nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain. Act of February 22, 1889, ch. 180, 25 Stat. 676 (emphasis added).

The Committee of Indian Affairs first suggested the school provision when the bill was pending before it, even though Senator Gamble felt that the provision itself was superfluous as the grant to the state would become operative without further legislation when, in his words, the "reservations were opened, as in this case, and became a part of the public domain . . . ." 35 Cong. Rec. 4856 (1902).

Admittedly Congress, at the time of this debate, had not yet abandoned the policy to which plaintiff refers to in its brief at 29-31, and so the "public domain" and "extinguished reservation" concept is understandable. After all, Congress was concerned with the original 1901 lump-sum cession agreement which would have had this effect on the Rosebud Reservation. In other words, at least as far as the Rosebud Reservation is concerned, Congress had not as yet, as plaintiff again correctly states, "abandoned this policy" in favor of the "new" policy, i.e. the trustee-homestead amendment.

But why is this school land provision, founded as it is upon a provision made operative only when "the reservation shall have been extinguished and such lands restored to, and become a part of, the public domain," still present in the final act representing plaintiff's "new" policy which purportedly did not diminish or extinguish reservations? And what is Congressman Burke doing explaining the school land provision to the House of Representatives on January 30, 1904, after the adoption of the new policy, in not only the same descriptive terminology of the old policy which plaintiff has argued has been abandoned, but also in terms of the same diminutive or extinguishing concept the old policy would have had on the reservation!

> Mr. FINLEY: Mr. Speaker, I observe that in section 4, reserving school lands, it is provided that the government pay for those lands. Is that the usual appropriation that is put in all bills of this character?

Mr. BURKE: I am glad that the gentleman has asked me that question. I would state that under the enabling act under which the State of South Dakota was admitted to the Union it was provided that sections 16 and 36 in said State should be reserved for the use of the common schools of that State, and it further provided that as to the lands within an Indian reservation the provisions of that grant would not become operative until the reservation was extinguished and the land restored to the public domain. That enabling act was passed by Congress on the 22nd day of February, 1889. In March of that same year Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or eleven millions of acres of land, and made an express appropriation, in accordance with provisions of the enabling act, to pay outright out of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the treaty.

Mr. FINLEY: Then, as I understand the gentleman, he bases the wisdom or equity for this provision upon the enabling act admitting South Dakota into the Union.

Mr. BURKE: Yes.

Mr. FINLEY: And not otherwise?

Mr. BURKE: No. 38 Cong. Rec. 1423 (1904) (emphasis added).

Precisely the same underlying reason for the inclusion of this school land provision in the final act, namely that the act would extinguish that portion of the reservation and hence make operative the enabling act, is also given in all of the House and Senate Reports submitted after the adoption of plaintiff's "new" policy:

> The bill also provides that sections 16 and 36 or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and an appropriation of $90,000 is made for this purpose. This provision is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act, which provided that any reservations open to setttlement subsequent to the admission of the State into the Union, that sections 16 and 36 would be reserved and ceded to the State for school purposes. H.R. Rep. No. 3839, 57th Cong. 2d Sess. 2 (1903).
>
> The bill also provides that sections 16 and 36, or the equivalent of two sections in every township,shall beceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and an appropriation of $90,000 is made for this purpose. This provision is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act, which provided that in any reservations open to settlement subsequent to the admission of the State into the Union, that sections 16 and 36 would be reserved and ceded to the State for school purposes. S. Rep. No. 3271, 57th Cong. 2d Sess. 2 (1903).
>
> Section 4 of the bill provides that sections 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and section 5 provides for an appropriation of $90,000 for this purpose. This is in conformity with the guaranty given to the State of South Dakota by Congress in the enabling act, which provides that in any reservations opened to settlement subsequent to the admission of the State into the Union sections 16 and 36 would be reserved and ceded to the State for school purposes. H.R. Rep. No. 443, 58th Cong., 2d Sess. 2 (1904).
>
> Section 4 of the bill provides that section 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and section 5 provides for an appropriation of $90,000 for this purpose. This is in conformity with the guaranty given to the State of South Dakota by Congress in the enabling act, which provides that in any reservation opened to settlement subsequent to the admission of the State into the Union sections 16 and 36 would be reserved and ceded to the State for

> school purposes. S. Rep. No. 651, 58th Cong., 2d Sess. 2 (1904).

The connotation of the "open to settlement" terminology has been discussed at 13-14, supra.

C. THE FINAL REPORTS: SENATE REPORT NO. 651 AND HOUSE REPORT NO. 443

Senate Report No. 651 and House Report No. 443 are one and the same, as the Senate Committee on Indian Affairs deemed the subject matter of the measure to be so "fully covered" (S. Rep., supra at 1) by House Report No. 443, they adopted it in its entirety. The report and appended materials consist of some 12 pages that relate, in detail, the history of the Gregory County Act. Although the counties deem the entire report to be extremely significant and have in fact discussed certain aspects of it elsewhere in this brief, only two areas will be examined at this point. Keeping in mind that the general purpose of this subsection was to show that Congress never intended that the trustee-homestead amendment would in any way affect the diminution of the Rosebud Reservation which would have occurred had the original 1901 lump-sum cession agreement been ratified, the counties note and deem significant the following paragraph:

> There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation, in South Dakota. S. Rep., supra at 3 (emphasis added).

This paragraph, especially when considered in connection with not only the tenor of the Commissioner of Indian Affairs testimony before the House Committee, but also the specific reply he made when asked about the advisability of consent (i.e., "If you wait for their consent in these matters, it will be fifty years before you can do away with the reservations.") (S. Rep., supra at 4-5, [emphasis added]) which was also reproduced in the report proper,[7] not only deals with the precise effect the 1904 Act was to have on the Rosebud Reservation, but also serves to put the issue in what the counties would term a proper historical perspective.

Both reports represent the final word of the Senate and House Committees on Indian Affairs, and in effect, of Congress itself.

The House passed the bill on February 1, 1904, after a short explanation by Congressman Burke, the significant portion of which has already been discussed in this brief. On April 18, 1904, the entire report was first read by the Secretary, and the bill passed the Senate without any discussion whatsoever.

V. THE DOCUMENTS AND STATUTES CONCERNED WITH GREGORY COUNTY AFTER THE PASSAGE OF THE 1904 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED

One would logically assume that if, after the 1901 agreement had been amended to include the trustee-homestead provision, a portion of the reservation was still to be "cut off," "extinguished,"

[7] By "report proper," the counties mean that portion of the report exclusive of the appended material.

and "restored to the public domain" and that portion remaining to be left "compact and in a square tract" and "still as large as" or "about equal in size to the Pine Ridge Reservation," as Inspector McLaughlin, Congressman Burke, Senator Gamble, and the language and provisions of the act itself indicated, there should be some confirmation of this diminutive effect in documents and statutes concerned with Gregory County and the Rosebud Reservation after the act had been passed and proclamation issued. C.T. at 22 (1903); 38 Cong. Rec. 1423 (1904); H.R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904). (Cited sources describing the effect of the 1901 agreement after it had been amended to include the trustee-homestead provision i.e., the 1904 Act.)

The counties submit that, in its entirety, the judiciary could not expect a more relevant, consistent, clear, immediate and unequivocal confirmation of this sort than the 1905 "extension" statute and peripheral materials concerned therewith.

1. 1905 Extension Statute

   a. S. Rep. No. 2760, 58th Cong., 3rd Sess. 1 (1905):

   > The Committee on Public Lands, to whom was referred the bill (S. 5799) to provide for the extention of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, S.Dak., having had the same under consideration, beg leave to report the bill back with the recommendation that it be amended, and that as amended it do pass . . . .
   >
   > The portion of the Rosebud Indian Reservation which was subject to the legislation provided by the act of April 23, 1904, was thrown open for settlement by the proclamation of the President of the United States under date of May 13, 1904 . . . (emphasis added).

   b. H. R. Rep. No. 4198, 58th Cong., 3rd Sess. 1 (1905):

   > The Committee on the Public Lands, to whom was referred the bill (S. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, S. Dak., having had the same under consideration, beg leave to report the bill back with the recommendation that it do pass.
   >
   > The portion of the Rosebud Indian Reservation which was subject to the legislation provided by the act of April 23, 1904, was thrown open for settlement by the proclamation of the President of the United States under date of May 13, 1904 . . . (emphasis added).

   c. 39 Cong. Rec. 1578 (1905) (remarks of Senator Gamble on S. 5799 on Jan. 30, 1905):

   > Extension of Time to Homestead Settlers.
   >
   > Mr. GAMBLE. I ask unanimous consent for the present consideration of the bill (S. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, S. Dak . . . (emphasis added).

   d. Act of February 7, 1905 (S. 5799) ch. 545, 33 Stat. 700: An Act To provide for the extension of time within which homestead settlers may establish residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota, ...
   >
   > Be it enacted . . ., That the homestead settlers on the lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota, opened

> under An Act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provisions to carry the same into effect, approved April twenty-third, nineteen hundred and four. . . be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened . . . (emphasis added).

   e. 33 L.D. 408 (1905):

   > Instructions. Department of the Interior,
   > General Land Office,
   > Washington, D.C., Feb. 9, 1905.
   >
   > Register and Receiver,
   >
   > Chamberlain, South Dakota. . . .
   >
   > Gentlemen: The Act of February 7, 1905, provides –
   >
   > That the homestead settlers on the lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota, opened under an act entitled "an Act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation . . . ." be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened and filed upon until the first day of May, anno Domini nineteen hundred and five . . . .
   >
   > You will see that as to lands in the former Rosebud Reservation, ... this act is given effect in your office as to all entries made of such lands prior to November 1, 1904.
   >
   > W. A. Richards, Commissioner.
   >
   > Approved: E. A. Hitchcock,
   > Secretary
   > (emphasis added).

Other miscellaneous documents which also attributed this same diminution to the 1904 Act include:

2. 33 L.D. 124 (1904):

   > Instructions. Department of the Interior,
   > General Land Office, Washington, D.C.,
   > July 19, 1904.
   >
   > Register and Receiver,
   >
   > Chamberlain, South Dakota.
   >
   > Sirs: All persons who apply to enter lands within the former Rosebud reservation, ...
   >
   > W. A. Richards, Commissioner.
   >
   > Approved: Thom. Ryan
   > Acting Secretary
   > (emphasis added).

3. Department of the Interior, Indian Affairs Ann. Rep. , Report of Agent for Rosebud Agency, Chas. E. McChesney, Agent, 334 (1904):

   > Sir: I have the honor to submit the annual report of this agency for the year ending June 30, 1904:
   >
   > The Rosebud Reserve embraces about 2,700,000 acres of land, situated entirely within the State of South Dakota, and extends from the Nebraska State line on the south to the White River on the north and from the Pine Ridge Reserve lines on the west to the range line between ranges 73 and 74 west, fifth principal meridian, on the east. All the land formerly belonging to this reserve east of the above range line is now open to settlement under

an act of Congress passed at the last session thereof. The opened portion includes about 416,000 acres (not counting the Indian allotments) and is the major part of Gregory County, S. Dak . . . (emphasis added).

4. FOURTH ANNUAL REVIEW OF THE PROGRESS OF SOUTH DAKOTA FOR 1904, III STATE DEPT. OF HISTORY, SOUTH DAKOTA HISTORICAL COLLECTIONS 21 (1906):

The State Historical Society takes pride in presenting herewith its Fourth Annual Review of the Progress of the State, and congratulates South Dakota upon continued excellent conditions and another year of prosperity and happiness.

Two circumstances, each unique in itself, have made the year notable in this state. The first of these was the opening of a portion of the Rosebud Indian Reservation to settlement, and the remarkable rush of homeseekers who desired to secure locations upon these fertile lands. The section opened by act of congress comprised about 416,000 acres of Gregory County, off of the east end of the reservation . . . (emphasis added).

5. C. T. at 4-5 (Dec. 1906):

Inspector McLaughlin: . . . There is no railroad running over any portion of the Rosebud Reservation, none within the boundaries of your reservation. That railroad in Gregory County has not yet come across your reservation boundary, but should it come into your reservation, you would receive pay for its right of way. Any of the Indians who may live in Gregory whose allotments have been crossed by that railroad, have, or will receive pay for the privilege of crossing their allotments, so you need not worry about that, my friends.

6. YESTERDAY AND TODAY: A HISTORY OF THE CHICAGO AND NORTHWESTERN RAILWAY SYSTEM, at 133 (1910). The following quotation from the annual report for fiscal year 1906 appears therein:

The company had also undertaken the construction of an extension from Bonesteel, South Dakota to Gregory, South Dakota, a distance of 25.93 miles, and would be complete during the ensuing fiscal year. This extension will pass through Gregory County, which embraces that portion of the Rosebud Indian Reservation opened to settlement in 1904, and will terminate near the present eastern boundary of that reservation (emphasis added).

7. 38 L.D. 214 (1909):

First Assistant Secretary Pierce to the Commissioner of the General Land Office, September 20, 1909 . . . .

. . . The land embraced in said entry is a part of the former Rosebud Indian Reservation opened to entry and settlement August 8, 1904, by proclamation of May 13, 1904 . . . (emphasis added).

8. Department of the Interior, Secretary of the Interior, Ann. Rep. 34 (1917):

Public Sales have been announced to take place during the coming season . . . of unsold lands in the former Rosebud Reservation in Gregory County, South Dakota (emphasis added).

This list of "former" references is not and was not intended to be complete in the sense that it includes all references of a later date concerned with the Gregory County opening. Nor is it intended that because of the "former" references such an intention must be "imputed" back to the 1904 Congress. Rather, the references are merely intended as a confirmation that the diminutive effect attributed to the 1904 act before passage, was recognized after the act was effective.[8]

Although it is the counties' position that the legislative history and the text of the 1904 Act, considered together and in their entirety, are sufficient to show that the 1904 Act was intended to

[8]The 1907 and 1910 confirmation sections are intended to be equally within the purposes and limitations stated in this paragraph.

diminish the Rosebud Reservation, certain related arguments do merit some discussion at this point.

Primarily, these arguments center around the "on, in, within," vs. "former, heretofore" controversy apparent in the briefs submitted to and in the opinions of, the courts which have construed acts similar to those in this case. To date, this controversy has been primarily limited to the language of the acts, proclamations, and a few later passed statutes, for the simple reason that these were the only materials presented. What little legislative history that some of the briefs did contain was presented in such a way as to not put the court in a position of having to weigh or consider the issue in its proper context.

In connection with the Gregory County Act and Proclamation, the controversy never really completely manifests itself. In the 1904 Act, Congress used the operative language "echoing an abandoned" (B.P. at 30) policy and that language is really not susceptible to the "preposition" argument. However, it is interesting to note that at 44 of plaintiff's brief is a list of four prepositions appearing in the 1904 Act. In light of the fact that all are in Article IV, however, which is the Article IV of the original 1901 lump-sum cession agreement in quotations (which plaintiff has conceded would have diminished the Rosebud Reservation), the counties submit that whatever probative value the "preposition" argument might have in other instances is completely lacking here.

The 1904 Proclamation contains the operative language echoing the same abandoned policy and hence plaintiff has not even attempted to subject it to the "preposition" argument. A detailed discussion of the other phases of preposition argument will be set forth after the Tripp and Mellette County materials have been examined.

1907 ACT[9]

If the counties' position as to the effect of the 1904 Act on the size of the Rosebud Reservation is correct, the materials surrounding the 1907 Act should not only independently support this position but should also indicate a similar effect was intended by the 1907 Act itself. Since the 1907 documents enable one to view the effect of the homestead acts on the Rosebud Reservation both retrospectively and prospectively, they will be analyzed from that vantage point. The format will consist of the same four interrelated subheadings used in the discussion of the Gregory Act.

I. THERE IS STILL NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE TRUSTEE-HOMESTEAD AMENDMENT WAS INTENDED TO AFFECT THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

The pillar of plaintiff's new policy, the trustee-homestead amendment, had been in effect for three years on the Rosebud Reservation and was about to be implemented again. Yet not one paragraph appears in any of the contemporary documents that clearly supports plaintiff's concept of a reservation. Even in light of the fact that three years had passed since the "new policy" was applied to the Rosebud Reservation, one would expect at least some sort of casual remark or other manifestation from someone.

II. THERE IS ADDITIONAL EVIDENCE THAT THE ONLY REASON FOR THE TRUSTEE-HOMESTEAD AMENDMENT WAS AN APPROPRIATION CONFLICT WHICH WAS NOT IN ANY WAY CONCERNED WITH THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP-SUM CESSION AGREEMENT

There is very little material even concerned with this aspect of the legislation--a fact which in and of itself supports the position taken by the counties. And as a corollary thereto, the reference that does appear is consistent with the material on this point previously presented.

> Hollow Horn Bear. . . . I want the Great Father's council to pay for this land at $5 per acre straight, to guarantee it . . . .
>
> Inspector McLaughlin. In reply to my friend Hollow Horn Bear, I desire to say there is very little difference in his proposition and what I am prepared to consider. The principal difference is that he demands $5 an acre for the entire cession and for the Government to guarantee the payment of that price. As to that, I wish you to clearly understand that Congress for the past 5 years has absolutely refused to consider any agreement for the cession of Indian reservation lands which stipulates a lump sum payment or binds the Government in any way to purchase the land or find purchaser for it. C.T. at 29, 30 (1906).

This is the only reference to plaintiff's "new policy" that appears anywhere in 1906 and 1907 Tripp County documents.

[9] Act of March 12, 1907, 34 Stat. 1230--all of Tripp County, and a portion of Lyman County.

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE 1907 ACT WAS INTENDED TO EFFECT A SIMILAR DIMINUTION TO THAT WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP SUM CESSION AGREEMENT AND WHICH DID FOLLOW THE 1904 ACT

A. CONTINUITY

If there is one striking characteristic that permeates all of the Rosebud materials from the conception of the original 1901 lump-sum cession agreement through the passage of the 1910 Act, that characteristic is continuity: A continuity of terminology, procedure, personnel, and most importantly, policy.

1. Terminology. The "cession" and "open" terminology continues to appear throughout the documents of the period and is used interchangeably with and equated to the "sale and dispose of" terminology. In one paragraph reference is made to "the sale of that part of Reservation located in Tripp County" and in the next to the disposal of the "land ceded," ad infinitum. Letter from F. E. Luepp, Commissioner of Indian Affairs to Inspector James McLaughlin, December 5, 1906.

2. Procedure. The Secretary of the Interior again requested the Office of Indian Affairs to "prepare instructions" for Inspector McLaughlin to enter into "negotiations with the Rosebud Indians for the cession" of certain land in South Dakota and Inspector McLaughlin was thereby detailed in the precise same manner as in 1901. Letter from F. E. Leupp, Commissioner of Indian Affairs to the Secretary of the Interior, December 5, 1906 (emphasis added). The instructions referred to fair terms, "similar to those in the disposal of the ceded lands in Gregory County." Letter to Inspector McLaughlin, supra. Inspector McLaughlin explained the purpose of his visit in the same manner: "I am here under orders of the Secretary of the Interior to submit to you a proposition for the cession of your surplus unallotted land in Tripp County." C.T. at 1 (1906). As in 1901, an agreement was reached wherein a majority of the members of the tribe agreed to "cede, grant, and relinquish to the United States all claim, right, title and interest in and to all that part of the Rosebud Indian Reservation lying . . . . S. Rep. No. 6831, 59th Cong., 2d Sess. 1 (1907) (emphasis added). Article II of the agreement provided that:

> In consideration of the lands ceded and relinquished by Article I of this agreement, the U.S. stipulates and agrees to dispose of the same, as hereinafter provided, under the provisions of the homestead and townsite laws, or by sale for cash, and shall be opened . . . . S. Rep., supra.

If the trustee-homestead policy was inconsistent with the "cede, grant, and relinquish to the United States all right, title and interest in" policy, the Secretary of the Interior, the Office of Indian Affairs and Inspector McLaughlin certainly were not aware that such a distinction should apply to the Rosebud Reservation.

The Office of Indian Affairs and the Secretary of the Interior attempted to make the legislation conform with the expectations of the Indians. Both recommended that the agreement be ratified with only those changes necessary to make it effective. S. Rep., supra at 4. On February 18, 1907, the Senate Committee on Indian Affairs concurred and Senate Report No. 6831 was submitted with the agreement basically intact. S. Rep., supra. However, at approximately the same time a bill sub-

stantially in the form of the final act has already passed the House. So the very next day the Senate Committee on Indian Affairs adopted the House bill, which was not in the "form" of the agreement, and the House report, which only appended the agreement. S. Rep. No. 6838, 59th Cong., 2d Sess. (1907). But for the fact that the other version had already passed the House, the 1907 Act could very well have ended up in the same form as the Gregory Act--a form containing the terminology of and representing a policy which according to plaintiff had long since been abandoned on the Rosebud Reservation.[10]

In any event, the fact that an agreement containing this "old" terminology was appended to and made part of the Senate and House reports is, in and of itself, significant. In addition, many of the provisions of the agreement were simply paraphrased and made a part of certain sections of the final act.[11]

3. Personnel. Many of the individuals responsible for the Rosebud legislation in 1907 were the same individuals that were responsible for the 1904 legislation. For the most part they were thoroughly familiar with the history of the Rosebud legislation, some even from the time of the 1901 agreement. In this light, the references to and provisions of the acts which are inconsistent with the continued existence of certain portions of the Rosebud Reservation become even more of an anomaly. See Note 6, supra.

In all instances, the 1907 bill and agreement were referred to as being "the same as" or "in line with" or substantially "similar to" the 1904 Act. C.T. at 31 (1906); 41 Cong. Rec. 3104 (1907); Letter to Inspector McLaughlin, supra. And the 1904 Act was consistently referred to by these men in such a manner as to leave little doubt that Gregory County was simply no longer considered to be a part of the Reservation. For example, there is Inspector McLaughlin's comment about the railroad set forth at 20 supra, and also the continual reference to Tripp County, not Gregory County, as the eastern part of the Reservation:

> High Pipe: The best land we have is in the eastern part of our reservation, Tripp County. C. T. at 8 (1906) (emphasis added).

The agreement itself, the House and Senate Documents, and the Congressional Record also support this conclusion:

---

[10] Perhaps the reason why the House did not ratify the agreement in toto was that it had to be amended. In such a case, Inspector McLaughlin has succinctly stated in the very last paragraph of his report that:

> I desire to add that quite a number of the Indians before signing the agreement expressed themselves as fully concurring in all its provisions, but wanted it distinctly understood that should the agreement fail of ratification just as it was written, they did not wish their names transferred to appear as concurring in H.R. bill 20627, 58th Congress, 2d Session, or any other bill of a similar character, which they imagined was done with their signatures to the unratified agreement of September 14, 1901, when Gregory County lands were opened by the Act of April 23, 1904. Letter from Inspector James McLaughlin to the Secretary of the Interior, February 12, 1907.

[11] The articles in the agreement were prefaced with "It is further agreed . . ." and "It is understood . . ." In all instances these phrases were deleted in the final act with the sections therein simply beginning with "That . . ." In many instances the remainder of the provisions were then retained in toto. For example, compare the school land provision in the agreement and the final act. In essence, as Congressman Burke stated, the whole act was "substantially in accordance with an agreement which has just been made with the Indians . . ." 41 Cong. Rec. 3104 (1907).

> cede, grant, and relinquish to the United States all claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation lying south of Big White River and east . . . . S. Rep. No. 6838, 59th Cong., 2d Sess. 4 (1907) (emphasis added).
>
> The purpose of this bill is to authorize the opening and sale of that portion of the Rosebud Reservation in South Dakota known as Tripp County, and it affects all that portion of the reservation east of range 25 of the fifth principal meridian south of the Big White River, and embraces about 1,000,000 acres.
>
> In the second session of the Fifty-eighth Congress a law was passed authorizing a sale of so much of this same reservation as was located in Gregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County. H.R. Rep. No. 7613, 59th Cong. 2d Sess. 1 (1907) (emphasis added).
>
> The purpose of this bill is to authorize the opening and sale of that portion of the Rosebud Reservation in South Dakota known as Tripp County, and it affects all that portion of the reservation east of range 25 of the fifth principal meridian south of the Big White River, and embraces about 1,000,000 acres.
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Congressman Burke's comment, discussed at 27, infra.

Gregory County was not a part of the Reservation in 1907 and as the material in the next sections indicate, Tripp County would soon be similarly located.

B. THE CENTRAL THEME

The three sources cited below are an example of what the counties have attempted to stress throughout this entire section: that the central theme present in all of the Rosebud documents of this period is a concept of a reservation already diminished by one act, and soom to be diminished by another.

1. Commissioner of Indian Affairs. On December 15, 1906, F. E. Leupp, the Commissioner of Indian Affairs, submitted a 12 page report to the Secretary of the Interior on a bill that was then pending to dispose of that part of the Rosebud Indian Reservation in Tripp County, South Dakota. On the last page therein, he stated in simple and concise terms that:

> I have heretofore said in substance that, in my judgment, it is a mistake for Congress to direct the restoration of the surplus lands of an Indian Reservation to the public domain without first referring the question to the Indians . . . . Letter from F. E. Leupp, Commissioner of Indian Affairs to Secretary of the Interior, December 15, 1906 (emphasis added).

If the presence of the trustee-homestead provision in the Rosebud legislation was inconsistent with the restoration of lands to the "public domain," and hence inconsistent with the doing away with reservations, someone certainly should have communicated this information to the Commissioner of Indian Affairs. In addition, the counties would submit that the probative value of statements such as this is enhanced by the fact that this Commissioner was not a novice in these matters. Indeed, this is the same Commissioner who used the "doing away with reservations" terminology after the adoption of the trustee-homestead provision while testifying before the House Committee on Indian Affairs in 1904, which was included, along with his report on the final draft on the 1904 Act, in both the 1904 Senate

and House Reports.

2. The School Land Provision. Section 6 and 7 of the 1907 Act specifically provided that certain lands granted to the state be paid for by the Federal Government. The members of the House and Senate who were not as familiar with the Rosebud legislation as others more directly involved, were consistently and in all instances given the same explanation for this appropriation. A portion of the reservation would be extinguished by the 1907 Act (Tripp County), as portions thereof had been extinguished before, and a section of the enabling act required in such cases that land then be granted to the state. When Congressman Burke presented the bill to the House the following exchange took place:

> Mr. Finley. Does not the gentleman think that the State of South Dakota should have land for school purposes, as is provided in the bill, and that the Government should pay for the land?
>
> Mr. Burke of South Dakota. I will answer that question by stating that in at least six different instances since South Dakota was admitted into the Union Congress has made an appropriation and paid for the school sections under the guaranty that was given to the State when we came into the Union.
>
> Mr. Finley. Why is that where certain sections have been allotted or patented the Government is called upon to pay for sections 16 and 36?
>
> Mr. Burke of South Dakota. That refers to sections that have been allotted to the Indians, and it has always been the custom where school sections have been allotted to give to the State in lieu of such sections other sections, not exceeding two in any township.
>
> Mr. Finley. Is it true that some of these lands have been allotted to the Indians?
>
> Mr. Burke of South Dakota. It is true that a portion of the lands have been allotted to the Indians.
>
> Mr. Finley. Does the gentleman think the Government should be called upon to pay to the State of South Dakota for lands allotted to the Indians? Doesn't the land belong to the Indians? I ask the gentleman if that practice has been the usual one?
>
> Mr. Burke of South Dakota. We have heretofore appropriated to pay for sections 16 and 36 in every township, or where they had been taken to pay for a section in lieu thereof.
>
> Mr. Finley. Has that been the rule where lands are allotted to Indians?
>
> Mr. Burke of South Dakota. Yes; that has been the rule and was the rule in the former Rosebud bill which passed the Fifty-eighth Congress, and is exactly in line with this provision, and the price is the same. 41 Cong. Rec. 3104 (1907).

Although Congressman Burke could have explained the necessity for the inclusion of such a provision more succintly as he had in other instances, an examination of the House and Senate reports reveals why such a detailed statement in this instance would have been superfluous. One entire page of each of these reports is devoted to this very question:

> Section 6 of the bill reserves sections 16 and 36 in each township for the use of the common schools, and grants the same to the State of South Dakota, and section 7 makes an appropriation to pay for the same at $2.50 per acre. This is following the precedents which have heretofore been established in the opening of other reservations in South Dakota, and is based upon section 10 of the act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:
>
> SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed

> States, and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor indemnity provisions of this act, nor shall any lands embrace.. n Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands restored to and become a part of the public domain.
>
> The following are the precedents:
>
> By section 30 of the act opening and dividing the Great Sioux Reservation, sections 16 and 36 were granted to the State, and an appropriation of $1.25 per acre was made to pay for same. Act approved March 2, 1889. (25 Stat. L., 898.)
>
> By section 30, act approved March 3, 1891, opening the Sisseton and Wahpeton Reservation, the school sections were ceded to the State and an appropriation made, and the same were paid for at $2.50 per acre. (26 Stat. L., 1039.)
>
> By act of August 15, 1894, opening the Yankton Reservation, the school sections were ceded to the State and paid for at $3.75 per acre. (28 Stat. L., 313.)
>
> Act providing for sale of Rosebud Reservation, in Gregory County, school sections were ceded and paid for at $2.50 per acre and act authorizing sale of a portion of the Lower Brule Reservation, first session of the (Fifty-ninth) Congress, school sections were ceded to the State and paid for at $1.25 per acre. H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907); S. Rep., No. 6838, 59th Cong., 2d Sess. 3 (1907) (emphasis added).

Whether one prefers the "opening" of the 1889 Reservation or the "sale" and "cede" of the 1904 Gregory County Act or whatever, the 1907 Act was intended by Congress to extinguish that portion of the Rosebud Reservation lying in Tripp County and restore it to the public domain in the same manner that the acts listed as "precedents" had extinguished and restored portions of other South Dakota Reservations to the public domain! It is with this in mind, as well as Commissioner Leupp's statement, that we now turn back to a comment made by Congressman Burke on the floor of the House.

3. The Congressional Record. Certain statements appear throughout the Rosebud documents that the counties submit are susceptible of only one interpretation when viewed in their proper historical perspective and in light of the information stated in the other contemporary documents dealing with that reservation. Congressman Burke made just such a statement on the floor of the House on February 16, 1907:

> The Indians, as I have stated before, have agreed to the disposition of it under the terms of the bill. They will have left, after this land is disposed of, a reservation that is substantially 50 miles square, and there are only 5,000 Indians. 41 Cong. Rec. 3104 (1907) (emphasis added).

This statement is the perfect example of how the serial effect of the Rosebud homestead acts can be viewed both retrospectively and prospectively. Retrospectively, Gregory County was no longer a part of the reservation. Prospectively, Tripp County would soon be similarly located. The materials in the next section are listed merely to confirm this observation.

IV. THE DOCUMENTS AND STATUTES CONCERNED WITH TRIPP COUNTY AFTER THE PASSAGE OF THE 1907 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED AGAIN.

1. 37 L.D. 124 (1909):

OPENING OF ROSEBUD INDIAN LANDS IN SOUTH DAKOTA (TRIPP COUNTY).

Regulations

Department of the Interior
Washington, D.C., Aug. 25, 1908.

The Commissioner of the General Land Office.

Sir: Pursuant to the proclamation of the President issued August 24, 1908, for the opening to settlement, occupation, and entry of certain lands formerly within the Rosebud Indian Reservation in the State of South Dakota, under the act of Congress approved March 2, 1907 (34 Stat., 1230) . . . .

Very respectfully,

Jesse E. Wilson,
Acting Secretary
(emphasis added).

2. EIGHTH ANNUAL REVIEW OF THE PROGRESS OF SOUTH DAKOTA FOR 1908. V. STATE DEPT. OF HISTORY, SOUTH DAKOTA HISTORICAL COLLECTIONS 45 (1910):

Perhaps the most noteworthy event of the year 1908 in South Dakota has been the opening to settlement of the unallotted lands in Tripp County, formerly a portion of the Rosebud Indian Reservation. Pursuant to an act of Congress providing for the opening of these lands, the President in September issued his proclamation, directing that from October 7 to October 17 parties desiring to locate homesteads upon the Tripp County lands be permitted to register for the chance of drawing a homestead at Dallas, Bonesteel, Chamberlain or Presho, and during the period designated 114, 769 registrations were made, though there were but about four thousand homesteads available. The registrations exceeded the former rush to Gregory county lands in 1904 by more than eight thousand . . . (emphasis added).

3. Report of the Commissioner of Indian Affairs, Annual Report of the Rosebud Agency, C.L. Ellis, Agent, 21 - 27 (1909):

The Rosebud agency is located on the southern boundary of South Dakota. Originally the reservation extended to the Missouri river on the east, a distance of 150 miles east and west, and 50 miles north and south, and contained about three and one-quarter million acres of land. By the act of April 23, 1904, that part now known as Gregory County, on the eastern end of the reservation, was ceded and the surplus or unallotted lands made available for homesteads. Under the act of March 2, 1907 (Public No. 195), a tract about 33 miles east and west and 50 miles north and south, known as Tripp County, and east of the present diminished reservation was opened to settlement . . . .

What is now known as the diminished reservation is a tract about 50 miles square embracing the western part of the original reservation . . . .

If the whole of the diminished reservation was attached to Tripp County for judicial purposes it would be much more convenient and expeditious . . . .

The diminished reservation, containing about 2500 square miles, is wholly a cattle range at present . . . .

The burning of the grass on a great part of Tripp County early last winter found

many of the cattlemen's stock to seek grass on the diminished reserve . . . .

In order to keep the cattle of the diminished reservation from becoming reinfected by mingling with outside stock I have asked authority for material and labor to complete the south fence line, and to construct a fence along the Tripp County line to the 10th Parallel. Many thousands of posts and much labor have been expended in repairing the fences on the other three sides of the reservation this season and they are now in good condition.

All the other day schools are located in the diminished reservation . . . .

Many new towns have sprung up near the reservation boarders and in Tripp County . . . .

C.L. Ellis,
Special Indian Agent
in charge
(emphasis added).

4. Report of the Commissioner of Indian Affairs, 42 (1909):

Rosebud, S. Dak.--This reservation has been diminished very rapidly within the last few years by various acts of Congress . . . .

Respectfully,

Robert G. Valentine
(emphasis added).

5. Act of Aug. 17, 1911, ch. 22, 87 Stat. 21 (S. 3152):

Be it enacted . . . That any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation in the State of South Dakota, authorized by the Act approved March second, nineteen hundred and seven . . . (emphasis added).

6. S. Rep. No. 115, 62nd Cong., 1st Sess., (1911), containing a letter dated August 2, 1911, from Samuel Adams, acting secretary of the Interior to Hon. Charles H. Burke, House of Representatives. Mr. Adams proposed a version of a bill to extend relief to settlers who had entered lands in Tripp County, South Dakota. The proposed bill read in part:

> That any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation in South Dakota, authorized by act approved, March second, nineteen hundred and seven, may apply to the register and receiver of the land office in the district in which the land is located, for an extension of time in which to make payment (emphasis added).

7. 47 Cong. Rec. 3841 (1911):

Mr. Burke of South Dakota. . . . Mr. Speaker, the bill H.R. 13044, which is the bill now under consideration, you will notice, proposes to affect lands in what was formerly the Rosebud Reservation and the Cheyenne and Standing Rock Reservations in North and South Dakota. The bill as amended in committee eliminates the Cheyenne and Standing Rock Reservations in North and South Dakota, because of no emergency existing as to those reservations at the present time (emphasis added).

8. 40 L.D. 54 (1911):

NEWTON DEXTER BURCH.

Decided April 26, 1911.

ROSEBUD INDIAN LANDS -- SOLDIERS' ADDITIONAL RIGHT.

Lands in the former Rosebud Indian Reservation opened by proclamation of August 24, 1908, under the act of March 2, 1907, to disposal under the general provisions of the homestead and townsite laws, are not subject to appropriation by location of soldiers' additional right.

PIERCE, First Assistant Secretary:

Newton Dexter Burch has filed appeal from decisions of January 18, 1911, by the Commissioner of the General Land Office, holding for cancellation the final certificate and rejecting his several applications filed on or about October 8, 1909, under sections 2306 and 2307, R.S., for the different subdivisions of the SW 1/4 of Sec. 27, T. 101 N., R. 76 W., 5th P.M., containing 160 acres, Gregory, South Dakota, land district. The said tracts are a part of the former Rosebud Indian Reservation, opened by proclamation of the President, dated August 24, 1908 (37 L.D., 122), under the act of March 2, 1907 (34 Stat., 1230) . . . (emphasis added).

9. 40 L.D. 267 (1911):

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., September 8, 1911.

Register and RECEIVER,
Gregory, South Dakota.

GENTLEMEN: Your attention is directed to the provision of the act of Congress, approved August 17, 1911, (Public--No. 22), entitled "An act extending the time of payment to certain homesteaders in the Rosebud Indian Reservation, in the State of South Dakota," which reads as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation, in the State of South Dakota, ...

Very Respectfully,

John McPaul

Approved Samuel Adams,
Acting Secretary
(emphasis added).

10. Act of Jan. 11, 1915, 33 Stat. 792:

> AN ACT Providing for the purchase and disposal of certain lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, formerly a part of the Rosebud Indian Reservation in South Dakota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County in what was formerly within the Rosebud Indian Reservation in South Dakota, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands (emphasis added).

11. 52 Cong. Rec. 453 (1914):

Mr. Burke of South Dakota. I will state that this bill originally as introduced, or a

similar bill, was limited to Tripp County, what was formerly part of the Rosebud Reservation . . . .

. . . so that it will be limited to lands in Tripp County, in what was formerly within the Rosebud Indian Reservation . . . .

. . . so that the bill will be limited to lands in Tripp County formerly within the Rosebud Indian Reservation (emphasis added).

12. 44 L.D. 195 (1915):

TRIPP COUNTY MINERAL LANDS--ACT JANUARY 11, 1915.

INSTRUCTIONS.
(No. 425.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, July 15, 1915.

REGISTER AND RECEIVER,
United States Land Office,
Gregory, South Dakota.

SIRS: 1. The act approved January 11, 1915 (38 Stat., 792), provides that all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, in what was formerly within the Rosebud Indian Reservation in South Dakota, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands, ...

Very respectfully,

Clay Tallman,
Commissioner.

Approved, July 15, 1915:
A. A. Jones
First Assistant Secretary
(emphasis added).

13. 44 L.D. 325 (1915):

EDITORIAL NOTE

In connection with the foregoing regulations as printed in pamplet form there were added, as an appendix, for information and convenient reference, reprints of the instructions of . . . 44 L.D., 195, under the act of January 11, 1915, providing for the purchase and disposal of certain lands containing kaolin, kaolinite, fuller's earth, China clay, and ball clay, in Tripp County, formerly a part of the Rosebud Indian reservation, South Dakota (emphasis added).

14. Department of the Interior, Ann. Rep. of the Comm. of the General Land Office, 165 (1916):

Rosebud Indian Lands.

Unentered land within the former Rosebud Indian Reservation in Lyman and Tripp Counties, South Dakota, were offered for sale to the highest bidders for cash at Gregory, South Dakota, on September 23, 1915. The prices received ranged from $2.50 to $7 per acre. In all 5,763.71 acrrs were sold for $17,866.07. All tracts were sold. The sale was made under authority of the act of March 2, 1907 (34 Stat. 1230), and departmental regulations approved July 28, 1915 . . . .

Very respectfully,

Clay Laceman, Commissioner
(emphasis added).

15. 47 L.D. 177 (1919):

REGULATIONS FOR THE SALE OF CERTAIN LOTS IN MINNEOTA TOWNSITE IN THE FORMER ROSEBUD INDIAN RESERVATION, TRIPP COUNTY, SOUTH DAKOTA.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D.C., May 24, 1919.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Under the provisions of the act of March 2, 1907 (34 Stat., 1230), you are directed to cause the lots designated from "A" to "S" inclusive in the townsite of Minneota within the former Rosebud Indian Reservation, Tripp County, South Dakota, to be offered for sale at public outcry under the supervision of the Superintendent of Opening and Sale of Indian Lands at not less than their appraised value on June 14, 1919, ...

Alexander T. Vogelsang
First Assistant Secretary
(emphasis added).

16. Annual Rep. of the Board of Indian Commissioners to the Secretary of the Interior, Report on the Rosebud Indian Agency, South Dakota, Hugh L. Scott, 28 (1921):

. . . there are several large towns on what used to be the old reservation. The largest is Winner, [Tripp County] . . . (emphasis added).

1910 ACT[12]

The 1910 materials are the most valuable documents for presenting what the counties would prefer to term, a proper historical perspective of the Rosebud legislation. Not only is the retrospective prospective aspect discussed in the 1907 section more pronounced because of the passage of time, but also herein lies the first history of the Rosebud legislation related by those members of Congress primarily responsible for the three acts.

Again, the format for presenting the 1910 materials will consist of the same four interrelated subheadings used in the discussion of the 1904 and 1907 acts.

I. THERE IS STILL NO EVIDENCE IN ANY OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE TRUSTEE-HOMESTEAD AMENDMENT WAS INTENDED TO AFFECT THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP SUM CESSION AGREEMENT

In light of the fact that the documents in this section set forth the entire history of the Rosebud legislation, one would expect that the elusive concept upon which plaintiff has premised its argument would at least be mentioned somewhere in these 300 odd pages--but it is not. Indeed, the counties have been unable to locate and plaintiff has not cited even one paragraph stating this concept in any of the Rosebud documents concerned with the three acts.

II. THERE IS ADDITIONAL EVIDENCE THAT THE ONLY REASON FOR THE TRUSTEE-HOMESTEAD AMENDMENT WAS AN APPROPRIATION CONFLICT WHICH WAS NOT IN ANY WAY CONCERNED WITH THE DIMINUTION WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP SUM CESSION AGREEMENT

One of the two individuals most directly involved with the Rosebud legislation from 1901 through 1910, was Congressman Burke. On April 27, 1910, on the floor of the House of Representatives, Congressman Burke confirmed what is in essence one of the counties' major premises: that the only reason for the "new policy" was an appropriation conflict which was not in any way concerned with or intended to affect the diminution issue.

> Mr. Burke of South Dakota . . . . The particular bill refers to that portion of the Rosebud Reservation in South Dakota known as Mellette County. There is contained in the tract affected by the legislation about 800,000 acres of land. The Rosebud Reservation is one of the separate reservations created out of the original Sioux Reservation by the department and, later, the act of Congress of 1889. There are about 5000 members of the Rosebud tribe. In the early nineties [1900's] a treaty was made with these Indians by which they agreed to cede to the United States so much of their surplus and unallotted lands as were located in Gregory County. The price to be paid for the lands was $2.50 an acre. Owing to objections here and elsewhere it was impossible to secure a ratification of that treaty.
>
> In the Fifty-seventh Congress, if I am correct about it, we enacted a law amending that treaty and changing it in this respect. Instead of paying to the Indian $2.50 an acre, the price agreed upon, we provided that lands disposed of in the first three months after the opening should be sold at $4 an acre; and next three months, $3 an acre; and lands disposed of after six months, $2.50 an acre; then, after four years after the opening, the

[12] Act of May 30, 1910, 36 Stat. 448--All of Mellette County.

> undisposed of lands were to be sold without any conditions as to residence or compliance with the homestead law and sold outright . . . . 45 Cong. Rec. 5456 (1910) (emphasis added).

The objections to which Congressman Burke alluded were the appropriation arguments set forth at 7-12, supra. As far as the Rosebud Reservation was concerned, this was the only change in policy.

Senator Crawford, on January 27, 1910, stated the same change in somewhat more general terms:

> Mr. Crawford . . . . By treaties negotiated from time to time, and by laws enacted from time to time, the area of lands occupied by the Indians has gradually narrowed to smaller and smaller limits, until now the lands owned by the Indians are comparitively small in quantity. They are not lands which in their possession bring any revenue whatever. They do not cultivate them. There is neither fish nor game upon them. The policy of the Government toward the Indians and toward these lands has changed in more recent years simply in this respect--that the lands be sold and the proceeds made into a trust fund, the principle forever held inviolate and the income from which is devoted to the Indians . . . . 45 Cong. Rec. 1068 (1910) (emphasis added).

It is the counties' position that in all other respects "The policy of the Government towards the Indians and toward these lands" remained the same. Not only the congressional documents and peripheral materials, but also the plain language and provisions of the 1910 Act itself, as set forth in the next section, fully support this position.

III. THERE IS EVIDENCE IN ALL OF THE CONTEMPORARY ROSEBUD DOCUMENTS THAT THE 1910 ACT WAS INTENDED TO EFFECT A SIMILAR DIMINUTION TO THAT WHICH WOULD HAVE FOLLOWED THE RATIFICATION OF THE ORIGINAL 1901 LUMP SUM CESSION AGREEMENT AND WHICH DID FOLLOW THE 1904 AND 1907 ACTS.

A. CONTINUITY

To a large extent, the continuity that has manifested itself throughout the history of the Rosebud legislation is still apparent in the documents surrounding the 1910 opening.

Some of the men concerned with the earlier Rosebud legislation were no longer in Washington, but the two most influential still remained: Senator Gamble and Congressman Burke. Inspector McLaughlin, although now presenting the proposals only to procure the Indians' views and not to obtain a signed agreement, was still negotiating with the Rosebud Indians in formal council at the Rosebud Agency.

The most striking evidence of continuity of policy can be gleaned from the remarks of various individuals and documents concerned with what then constituted the reservation. In the 1907 subsection on continuity the counties stressed that Gregory County was simply no longer considered a part of the reservation and Tripp County would soon be similarly located. The 1910 materials support this conclusion without exception.

(1) The Eastern and Northern Part. In 1901, the Indians and Inspector McLaughlin referred to Gregory County as the "eastern part" of the reservation. In 1906 the "eastern part" of the reservation was Tripp County. Now, in 1909 - 1910, the Indians and Inspector McLaughlin continually refer to certain townships located immediately west of Tripp County as the "eastern part of our reservation." C.T. at 6 (1909).

In this connection, they are joined by none other than the Secretary of the Interior, James Rudolph Garfield, who refers to this same strip of land as not only being east but also in the diminished

reservation--i.e. "on the east of the present diminished reservation." S. Rep. No. 887, 60th Cong., 2d Sess. 3 (1909) (emphasis added). (The cited source contains a letter from James Garfield, Secretary of the Interior to Robert J. Gamble, January 26, 1909.)

Corresponding to this "eastern" concept are the other references to the area to be opened by the 1910 Act as constituting the entire "northern part" or the "north part of our reservation." C.T. at 8,20 (1909).

(2) The Senate and House Documents. This same concept of precisely what the boundaries of the Rosebud Reservation encompassed was also present in Congress. In 1909 the Senate Report on the pending legislation stated that: "The present area of the Rosebud Indian Reservation aggregates 1,800,000 acres." S. Rep. No. 887, 60th Cong., 2d Sess. 1 (1909). Later, on the floor on the Senate, Senator Gamble remarked that "the Rosebud Indians have a reservation of nearly 2,000,000 acres." 43 Cong. Rec. 1679 (1909). The Senate Report of the 1910 bill reiterated that: "the present area of the Rosebud Indian Reservation aggregated about 1,800,000 acres." (S. Rep. No. 68, 61st Cong., 2d Sess. 2 [1910]), and the House report stated the same thing in more definite terms.

The counties would submit that to have a reservation with a present area of approximately 1,800,000 acres, to refer to land west of Tripp County as the east part of that reservation and Mellette County as the north part of that reservation, is to have a reservation in Congressman Burke's words "that is substantially 50 miles square" and whose boundaries could not possibly encompass either Tripp or Gregory County. Only with this concept in mind, can one grasp the full import of the Secretary of the Interior's statement that "the Rosebud Reservation has been reduced very rapidly during the last few years." Letter to Robert J. Gamble, supra.

Although primarily cited for the proposition that Mellette County was soon to be similarly located, some of the material in the next subsection should also be analyzed in retrospect as well as for the general evidence of continuity appearing therein.

B. A DIMINISHED RESERVATION

Three specific areas can be cited for the proposition the 1910 Act was to further diminish the Rosebud Indian Reservation in precisely the same manner as the 1904 and 1907 Acts: (1) The Anticipatory Statements, (2) Specific References to what was to be the Diminished Reservation, (3) Provisions of the 1910 Act.

(1) Anticipatory Statements. The counties include herein references such as:

> The present area of the Rosebud Indian Reservation aggregates 1,800,000 acres. The lands proposed to be opened to settlement under the provision of this bill embrace an area of about 900,000 acres . . . The reservation is yet large . . . . S. Rep. No. 887, 60th Cong., 2d Sess. 1,2 (1909) (emphasis added).
>
> The present area of the Rosebud Indian Reservation aggregates about 1,800,000 acres. The lands proposed to be opened to settlement under the provisions of this bill embrace an area of 830,000 acres . . . The reservation is yet large . . . . S. Rep. No. 68, 61st Cong., 2d Sess. 2 (1910) (emphasis added).
>
> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There will still be left a reservation containing about 1,000,000 acres . . . . H.R. Rep. No. 429, 61st

Cong., 2d Sess. 2 (1910) (emphasis added).

> Mr. Gamble. . . . The Rosebud Indians have a reservation of nearly 2,000,000 acres. A bill has been introduced and favorably reported by the Interior Department, and a unanimous report made from the Committee on Indian Affairs, under which it is proposed to open about one-half of the reservation to settlement . . . . 43 Cong. Rec. 1679 (1909) (emphasis added).

> No U.S. Indian Inspector nor any other person or persons as yet has been authorized to explain this bill to us; therefore we would like to see someone that can give us at least a word security regarding the opening of any lands upon what now constitutes our reservation. Petition by Indians of the Rosebud Reservation (signed by Todd Smith and Reuben Quick Bear) to Hon. Wm. H. Taft, President of the United States, February 25, 1910 (emphasis added).

The counties would submit that such statements "anticipate" a diminution of the reservation of the type referred to specifically in the next subsection.

2. Specific References to what was to be the Diminished Reservation. By letter of April 29, 1909, Inspector McLaughlin reported to the Commissioner of Indian Affairs that the Indians expressed "their concurrence in the opening of the northern strip, provided the two tiers of townships in the eastern part of Meyer County remain a part of the diminished reservation." Letter from Inspector James McLaughlin to the Secretary of the Interior, at 3, April 29, 1909 (emphasis added). He also told the Indians specifically that "The opening of that part of your reservation will not only increase the value of the lands in that tract, but will also add a great deal to the value of the lands in your diminished reservation." C.T. at 14, (1909) (emphasis added). Other references of this nature include, but are not limited to, the following:

> I do not believe, therefore, that the strip of land on the east of the present diminished reservation should be opened yet. S. Rep. No. 887, 60th Cong., 2d Sess. 3 (1909). The cited source contains a letter from James Garfield, Secretary of the Interior to Robert J. Gamble, January 26, 1909 (emphasis added).

> It also provides that the Secretary of the Interior in his discretion, may permit Indians who have an allotment within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere within the reservation proposed to be diminished. S. Rep. No. 887, 60th Cong., 2d Sess. 2 (1909) (emphasis added).

> It also provides that the Secretary of the Interior in his discretion, may permit Indians who have allotments within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere within the reservation proposed to be diminished. S. Rep. No. 68, 61st Cong., 2d Sess. 3 (1910) (emphasis added).

> The bill is carefully safeguarded and provides that Indians who have taken allotments in the area proposed to be disposed of may relinquish such allotments and be reallotted within the diminished reservation, if they so elect . . . .
> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There will still be left a reservation containing about 1,000,000 acres and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of. H.R. Rep. No. 332, 61st Cong., 2nd Sess. 2 (1910); H.R. Rep. No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

If there was no occasion for continuing a reservation larger than it would be when Mellette County was disposed of and the reservation was therefore to be diminished, one would expect the 1910 Act itself to contain not only provisions consistent with this objective but also provisions inconsistent with

the continued existence of that part of the reservation affected by the 1910 Act and indeed it does.

3. Provisions of the 1910 Act. Although the entire text of the 1910 Act is consistent with the concept of a diminished reservation, the counties will only discuss certain parts of sections 1, 2, 8, and 10 at this point.

(a) Section 8: School Lands. The history of this provision and the necessity for its inclusion in the 1901 agreement, the 1904 Act, and the 1907 Act has already been set forth in detail at 5, 29 - 34, 51 - 55, supra. Therefore, it is necessary only to state that the same reason, namely the extinguished reservation and public domain section of the enabling act which would be made operative by the 1910 Act diminishing the reservation, was given for its incorporation into the 1910 Act:

> Sections 16 and 36 of the lands in each townships are not to be disposed of, but are reserved for the use of the common schools of the State, and these lands are to be paid for by the Government in conformity with the provisions of the act admitting the State of South Dakota into the Union. S. Rep. No. 887, 60th Cong., 2d Sess. 2 (1909) (emphasis added).

> Sections 16 and 36 of the lands in each township are not to be disposed of, but are reserved for the use of the common schools of the State, and these lands are to be paid for by the Government in conformity with the provisions of the act admitting the State of South Dakota into the Union. S. Rep. No. 68, 61st Cong., 2d Sess. 3 (1910) (emphasis added).

> There is also a provision reserving sections 16 and 36 of the lands in each township for the use of the common schools of the State of South Dakota, to be paid for by the Government at $2.50 per acre. The granting of these lands to the State is in accordance with the provisions of the enabling act admitting South Dakota into the Union. H.R. Rep. No. 332, 61st Cong., 2nd Sess. 2 (1910); H.R. Rep. No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

> Mr. Gamble. . . . The Government agreed to reserve these lands and to pay for them, not only by law, but under the enabling act admitting the State of South Dakota to the Federal Union . . . .
> Mr. Crawford. . . . Sections 16 and 36, to which the Senator refers, are held from the settler, and are given to the State to keep good the pledge made to the State by the Government under the enabling act when the State was admitted into the Union . . . Mr. President, with reference to sections 16 and 36, they or their equivalent belong to South Dakota, because the Government of the United States granted section 16 and 36 to the State in the enabling act under which the State was admitted into the Union, as it has granted to states over and over again millions of acres of public domain for the establishment and maintenance of common schools. 45 Cong. Rec. 1068, 1071 (1910) (emphasis added).

(b) Section 10: Intoxicants. In the "why" section of plaintiff's brief the following question appears: "And why did Congress specifically prohibit the introduction of intoxicants into Mellette County for twenty-five years just as if that county were Indian country if it were not part of the reservation?" B.P. at 49. Although the counties think most of the questions plaintiff raises in that section of its brief are either self-explanatory or not of sufficient importance to merit an answer, the intoxicant question is an exception.

The rather obvious answer to plaintiff's inquiry is simply that Congress deemed it necessary to protect all of the individuals in Mellette County and therefore had to specifically legislate to that end because Mellette County would no longer be a part of the reservation and subject to the general law prohibiting intoxicants on reservations. The Secretary of the Interior, R. A. Ballinger, recommended

the intoxicant provision in light of the then recent Supreme Court Case of United States v. Dick, 208 U.S. 340 (1908), which held prohibitions of this nature to be constitutional even though the land was to be ceded and restored to public domain. Specifically, Mr. Ballinger stated:

> The Supreme Court of the United States in Dick v. United States (208 U.S., 340), sustained a provision prohibiting the introduction of intoxicating liquors upon lands ceded by Indians, for a period of twenty five years, but emphasized strongly the fact that the provision was for a limited period reasonable in duration. The Department doubts very much the advisability of attempting to impose upon ceded lands a perpetual prohibition against the sale of intoxicants, and also doubts the advisability of prescribing punishment for the sale of liquors in violation of the law . . . . Letter from R. A. Ballinger, Secretary of the Interior to Charles H. Burke, January 13, 1910.

In the end, Congress did not disagree nor think the request unreasonable and the provision was incorporated into the 1910 Act. Several of the comments in the Congressional Record that were directed to this provision are very interesting. For example:

> Mr. GOEBEL. I am opposed to attaching to the sale of any reservation conditions such as are proposed in this bill.
> Mr. GRONNA. Does the gentleman believe it would be safer on a reservation where liquors are permitted to be sold. Would the gentleman not buy land on a reservation where protection is given by the government, even if such reservation is located in a prohibition state?
> Mr. GOEBEL. Oh, I do not know what I would do. At present I would want to get the land without any conditions attached. You must also bear in mind that when the lands are sold there is no longer a reservation, and the laws of the states apply . . . .
> Mr. BUTLER. . . . If the land is sold it will be no longer an Indian reservation. It is where, as I understand, the Indian has always lived and where he is going to live, and I believe in keeping the sale of liquor out of his neighborhood, and for that purpose I propose in a kind and gentle way to suggest to gentlemen that if there is to be any attempt made to prevent the restraint being imposed upon this title they had better have a quorum of the House present to insure the success of the attempt. 45 Cong. Rec. 5463, 5464 (1910) (emphasis added).

Therefore, contrary to plaintiff's position, the mere presence of this provision is, in and of itself, evidence that Mellette County would no longer be a part of the reservation after the passage of the 1910 Act.

(c) Section 1: Indian Agency, School, and Other Lands. As for the land reserved as long as "agency, school, or religious institutions are maintained thereon for the benefit of said Indians" (Act, supra, Section 1) to which plaintiff also alludes, the counties can find nothing therein which is inconsistent with their position. After all, Congress was aware of the Indian population that was allotted within the "tract to be ceded" and certainly did not expect all of these individuals to "relinquish same and select allotments in lieu thereof on the diminished reservation." Act, supra, Section 1. As was the case with intoxicants, for Congress to provide for these individuals in this manner is not inconsistent with the fact that the area to be opened would no longer be a reservation.

(d) Section 4: Timber Lands. Although different reasons were given, the Congressional Record also supplies an answer to plaintiff's inquiry as to the reservation of timber lands for the use of the Rosebud Indians:

> Mr. STAFFORD. Will the gentleman explain why he recommends an exception in appraisement of mineral and timber lands?
> Mr. BURKE of South Dakota. Because they are not to be disposed of. We are reserving them. Consequently we provide that they shall not be appraised . . . .
> Mr. MONDELL. What is the gentleman's purpose in not disposing of the timber lands?
> Mr. BURKE of South Dakota. We are providing in this bill and in the other bill that is exactly in the same form for reserving the timber land for the use of the Indians as a forest. As a matter of fact, on this particular reservation there is not a single stick of timber, but the department seems to think the timber ought to be conserved, and so we put this language in the bill.
> Mr. MONDELL. You are conserving some timber that does not exist.
> Mr. BURKE of South Dakota. So far as this reservation is concerned that is true, but we are establishing a precedent that might be good to follow in other reservations where there may be timber . . . .
> Mr. BURKE of South Dakota. There is, as a matter of fact, no timber land in this reservation. We doubt if there will be found any lands that will be regarded as timber lands. But it was put in as a mere matter of precaution. 45 Cong. Rec. 5471, 5472 (1910) (emphasis added).

Even if the presence of this provision was other than merely precautionary, the counties would still be unable to discern any purpose other than one consistent with the acknowledgment by Congress of the continued presence of some members of the Rosebud Sioux Tribe in the area to be opened. In this light, the inclusion in the 1910 Act of some provisions for their benefit would seem to be entirely reasonable and not in any way inconsistent with the concept of a diminished reservation.

(e) Section I: "On the Diminished Reservation." At 45 of plaintiff's brief the following subheading appears:

> The Mellette County Act contains a phrase which renders Congress' intent regarding the future status of that portion of the Rosebud Reservation uncertain and therefore subject to the rule that doubtful expressions be resolved in favor of the Indians in statutes passed for their benefit. B.P. at 45 (emphasis as in original).

The phrase to which plaintiff refers states in simple and concise terms that:

> Provided, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation . . . . Act, supra (emphasis added).

The mere fact that plaintiff has devoted approximately six full pages of its brief in an attempt to convince the court to either totally disregard, attribute a different meaning to, or subject the phrase to some ambiguity rule, is of itself indicative of the degree of importance plaintiff attaches to this phrase. It first cites Congressman Burke's statement that the "lands were being sold by the government for the benefit of the Indian" as "legislative history" and then invokes its ambiguity rule. B.P. at 46. If that isn't sufficient plaintiff then states that:

> [T]he Rosebud Sioux Tribe maintains that the diminution referred to in the act is not a territorial diminution of the reservation in the ordinary sense of the word, but rather a diminution of the reservation only in the sense that the lands sold by the United States to settlers under the act would no longer be available to the Rosebud Sioux for future allotment or as a source of income, as they would have been but for this act. B.P. at 46.

The Rosebud Sioux Tribe might maintain this distinction exists but where, in any of the contemporary Rosebud documents, is there the slightest indication that Congress could have even understood this distinction, let alone apply it in the 1910 Act? As a matter of fact, an examination of any of the documents surrounding the 1910 Act would show not only that "diminished" was not "a lone doubtful island of language" (B.P. at 51) but also that the extraordinary "meaning" plaintiff

advances is without any foundation whatsoever.

As far as the significance which plaintiff has anticipated the counties would attach to this phrase, it has simply miscalculated. In the first place, the counties would never advocate that an issue of congressional intent be disposed of by either a casual reading of an act or the presence of an "isolated word." B.P. at 46. The whole of this brief has been constructed around the concept that if the acts are construed in their proper historical perspective and in light of all the probative evidence of congressional intent that is available, a picture of a reservation diminished by a series of acts unfolds. After all, in plaintiff's words, "This action seeks declaratory judgment as to the effect of these acts, 1904, 1907, 1910, on the size of the reservation. In truth, the action asks the court to define for the parties the present boundaries of the Rosebud Indian Reservation." A.P. at 2 (emphasis added). Of course, the counties deem significant the fact that the 1910 Act, on its face and in plain language referred to the tract as being "ceded" and the reservation as being "diminished." But it is when this phrase is viewed in conjunction with the other material, such as Congressman Burke's statement of April 27, 1910:

> Mr. BURKE of South Dakota. . . . I might say, Mr. Speaker, that there are two propositions to be considered in disposing of the unallotted and unused lands on Indian Reservations. One is, at the earliest possible date, to get among the Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms, and I believe that the placing through what were heretofore reservations actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of very little value . . . . 45 Cong. Rec. 5457 (1910) (emphasis added).

and House Reports No. 332, 429:

> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There will still be left a reservation containing about 1,000,000 acres, and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of . . . . H.R. Rep. No. 332, 61st Cong., 2nd Sess. 2 (1910); H.R. Rep. No. 429, 61st Cong., 2nd Sess. 2 (1910) (emphasis added).

that the "effect of the acts" on the "size" of the Rosebud Reservation can best be realized. This is the "effect" with which the counties are concerned and which has been preserved for the Court in the materials presented herein. What probative value that should be attached to any one phrase or provision in any of this material, is for the Court to determine.

IV. THE DOCUMENTS AND STATUTES CONCERNED WITH MELLETTE COUNTY AFTER THE PASSAGE OF THE 1910 ACT CONFIRM THAT THE ROSEBUD RESERVATION HAD IN FACT BEEN DIMINISHED AGAIN

1. Report of Commissioner of Indian Affairs, 32 (1910):

> Department of the Interior
> Office of Indian Affairs
> Washington, November 1, 1910
>
> Sir: I have the honor to transmit herewith the Seventy-ninth Annual Report of the Office of Indian Affairs covering the period July 1, 1909, to June 30, 1910 . . . .

> Rosebud, S. Dak. . . . This reservation has been diminished previously be various acts of Congress, and the act of May 30, 1910 (36 Stat., 448), authorizes the disposal of a part of this reservation lying within Mellette and Washabaugh counties . . . .
>
> Respectfully,
>
> Robert G. Valentine
> Commissioner
> (emphasis added).

2. Act of March 3, 1919, 40 Stat. 1320:

   (a) Be it enacted, etc., That the Secretary of the Interior is hereby authorized to sell and convey to the White River Cemetery Co., for cemetery purposes, for a price not less than the appraised value thereof, a 10-acre tract within the former Rosebud Indian Reservation in Mellette County, S. Dak. described as the northeast quarter of the southeast quarter of the northwest quarter of section 34, township 42 north, range 29 west, sixth principal meridian, or such part thereof as may be required: Provided, however, That the tract conveyed shall be described in terms of the legal survey, the consideration to be paid to the superintendent of the Rosebud Reservation, to be deposited in the Treasury of the United States to the credit of the Rosebud Indians (emphasis added).

   (b) S. Rep. No. 745, 65th Cong., 3rd Sess. 1-2 (1919).

H.R. 12082 was introduced for the purpose of selling 10 acres of land belonging to the Rosebud Sioux Tribe in Mellette County, South Dakota, to the White River Cemetery Company. Included in the report on the bill is a letter to Hon. Charles D. Carter, Chairman, Committee on Indian Affairs, House of Representatives, from Alexander T. Vogelsang, Acting Secretary of the Interior, June 7, 1918:

> My Dear Mr. Carter: I am in receipt of your letter of May 14, 1918, inclosing (sic) for report H.R. 12082, a bill authorizing the sale of certain lands in South Dakota for cemetery purposes, and in response thereto I have the honor to submit the following:
> The bill proposes to convey for cemetery purposes a 10 acre tract within the former Rosebud Indian Reservation in Mellette County, S. Dak., described as . . . Said land was opened to settlement and entry under the act of May 30, 1910 (36 Stat. 448) which provides that the proceeds of the sale of the lands in said former Indian reservation shall be deposited to the credit of the Indians thereof and that the disposal of the land by the United States shall be in trust for their benefit . . . (emphasis added).

Although the counties were not able to locate and compile the same amount of material for the 1910 confirmation section that was presented in the 1904 and 1907 sections, we did find two references of a later date that aptly summarized the total effect of the Rosebud legislation on the size of the Rosebud Reservation.[13] In 1940, Dr. Green described that effect as follows:

> The breakup of the Rosebud Reservation began in 1904. In that year Gregory County (about 416,000 acres) was ceded. In 1907 Tripp County, with an area about twice that of Gregory County, was transferred to the Government, and opened for settlement the following year. And on May 30, 1910, Congress confirmed an agreement for the cession of all surplus lands in Mellette and Washabaugh counties belonging to the Rosebud Sioux. These three cessions lopped off approximately three-fourths of the original Rosebud Reservation and leaves, at the present time, only the area within Todd County as a closed reservation . . . . XX STATE DEPT. OF HISTORY, SOUTH DAKOTA HISTORICAL

[13] Part of the difficulty in locating material for this section was due to the fact that the counties were unable to obtain certain volumes which would have contained additional material on Mellette County. Specifically, the counties have in mind the Rosebud Agency Reports and Public Land Decisions. To a lesser degree, this was also true in the 1904 and 1907 confirmation sections. Also See Note 8, supra.

COLLECTIONS 34 - 35 (1940). The cited source contains the Doctoral dissertation of Charles Lowell Green entitled "The Administration of the Public Domain in South Dakota" (emphasis added).

On May 28, 1959, the Assistant Secretary of the Interior, Roger Ernst, in a letter to E. Y. Berry, more succintly stated:

> . . . The boundaries of the Rosebud Indian Reservation were changed to eliminate Mellette County, and to show the diminished reservation as lying in Todd County. This is shown on the map of South Dakota published by this Department in 1918. There remained, however, within Mellette County Indian allotments which were effective and did not come within the cession and opening under the 1910 act. The ceded lands fall within not only Mellette County, but the adjoinging counties within the former boundary of the original Rosebud Indian Reservation. Letter from Roger Ernst, Asst. Secretary of the Interior to E. Y. Berry, May 28, 1959 (emphasis added).

With respect to a summary statement at this point, there is very little the counties could add to Mr. Ernst's letter.[14]

[14]The 1918 map referred to in Mr. Ernst's letter, in addition to others, will be presented to the court.

PART TWO

I. THE SEYMOUR CASE

> There will still be left a reservation containing about 1,000,000 acres [Todd County], and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of. H.R. Rep. No. 429, 61st Cong. 2d Sess. 2 (1910).

In 1910 Congress dictated that this was all that would remain of the original Rosebud Reservation, and for over 60 years Todd County has been considered to be the Rosebud Reservation. It is the position of the counties that neither Seymour v. Superintendent, 368 U.S. 351 (1962), nor the other recent decisions constitute a mandate to this court that it must disregard the intent of Congress as evidenced by the passage of these three acts. The Seymour case did not hold that all acts similar to the one construed therein were not intended by Congress to diminish reservations. On the contrary, Justice Black specifically stated that:

> In United States v. Celestine, this Court said that "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." We are unable to find where Congress has taken away from the Colville Indians any part of the land within the boundaries of the area which has been recognized as their reservation since 1892. 368 U.S. at 359 (emphasis added).

Implicit in the second sentence, is a situation which certainly does not describe the Rosebud materials, for not only was the Supreme Court in Seymour unable to find evidence of congressional intent to take away from the Colville Indians any part of the land within the boundaries of the 1892 Colville Reservation, but what evidence they did find indicated that Congress consistently continued to recognize the reservation boundaries as established by the 1892 act.[15]

This is simply not the case with the Rosebud materials and even the appellant in Seymour recognized the importance of such a distinction when at 11 in his brief he stated:

> Both LaPlant and Sauter dealt with the Act of May 29, 1908, 35 Stat. 460, which authorized sale and disposition of two tracts of land of the Cheyenne River and Standing Rock Reservations in South Dakota. Section 2 of that act refers to the respective reservations as "thus diminished." The reports of the Congressional committees referred to the reservations as "diminished" and "reduced" should the bill, which became the Act of May 29, 1908, become law. S. Rept. No. 439 and H. Rept. No. 1539, 60 Cong., 1st Sess. The Act of 1908, like the Colville Act of 1906, makes the United States trustee for the Indians in sale of the lands, but there is no provision or legislative history relating to the Colville Act which shows that Congress intended to change the Colville boundaries as it did the boundaries of the South Dakota reservations. Brief for Appellant at 11, Seymour v. Superintendent, 368 U.S. 351 (1962) (emphasis added).

Nothing in the Seymour opinion can be construed in such a manner to indicate that the United States Supreme Court did not or would not continue to recognize this distinction. Indeed, the counties would submit that it was for this very reason that the opinion continually referred to only the situation

[15]"That this is the proper construction of the 1906 Act finds support in subsequent congressional treatment of the reservation. Time and time again in statutes enacted since 1906, Congress has explicitly recognized the continued existence as a federal Indian reservation of this South Half or diminished Colville Indian Reservation." 368 U.S. at 356.

that the Court found to exist in the Colville materials. In addition, there is not so much as even a footnote casting doubt upon what was then the highly regarded line of cases from the Eighth Circuit and the State of South Dakota. As a matter of fact, the only reference to any case concerned with a South Dakota reservation in the entire opinion is in footnote 19, wherein Justice Black cites with approval the Eighth Circuit case of United States v. Frank Black Spotted Horse, 282 F. 349 (8th Cir. 1922). In Spotted Horse the Federal District Court of South Dakota held that Todd County "in the absence of an act of Congress opening that country to settlement, and disintegrating the reservation, remarking and changing the reservation boundaries, marking the changes, or abolishing it entirely" (282 F. at 352 [emphasis added]), was still the Rosebud Reservation and all land within it was subject to the jurisdiction of the United States.

Although Justice Black undoubtedly cited the case only for a specific reason,[16] the tenor of the whole decision was that under the then established law,[17] Todd County was the Rosebud Indian Reservation. Gregory, Tripp, Lyman and Mellette County are not even mentioned in the Frank Black Spotted Horse decision.

It would seem to the counties that Frank Black Spotted Horse would be a questionable case at best to cite with approval, if the Supreme Court intended Seymour to be construed in such a manner as to virtually destory the 50 years of South Dakota reservation case law in the Eighth Circuit.

In any event, for the Court to hold in Seymour that the Colville Act was not inconsistent with the continued existence of the reservation boundaries is one thing. The statement appearing in plaintiff's brief at 18 is quite another:

> The Court's decision, presumably made with the above historical circumstances in mind, was that the Colville Act, in opening the surplus and unallotted land on that reservation to non-Indian settlers, did not expressly disestablish or diminish the Colville Reservation, and that, because it had not do [sic] so expressly, it had not done so at all. B.P. at 18 (emphasis as in original).

Not even the recent decisions have gone so far as to cite Seymour for this proposition, let alone state it as the "decision" of the Court. The counties note that although the Seymour opinion did use the word "expressly" in two instances, the first was not even related to plaintiff's statement:

> This Act did not, however, purport to affect the status of the remaining part of the reservation, since known as the "South Half" or the "diminished Colville Indian Reservation," but instead expressly reaffirmed that this South Half was "still reserved by the Government for their "(the Colville Indians') use and occupancy." 368 U.S. at 354.

In the second, Justice Black was merely noting the difference between the 1906 and 1892 Act when he stated:

> Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public domain. 368 U.S. at 355.

Had Justice Black thought it necessary to state the holding in a manner even approaching the force of

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[16] The Frank Black Spotted Horse opinion rejected the "checkerboard" concept of criminal jurisdiction within Todd County.

[17] United States v. LaPlant, 200 F. 92 (D.S.D. 1911).

plaintiff's statement, he was certainly capable of doing so.[18]

II. THE RECENT DECISIONS AND PLAINTIFF'S "BUNDLE OF RIGHTS" ARGUMENT

The counties would also submit that none of the recent decisions can be argued to stand for the proposition that this court must disregard the intent of Congress as evidenced by the passage of the three specific acts presented herein. The Rosebud Reservation is a reservation separate and distinct from all other reservations, and each act which this court must construe affected only the Rosebud Reservation.

Secondly, it is the counties' position that this court is the first court to have the opportunity of deciding the issue in its proper historical perspective and in light of the legislative history available--for three very important reasons.

1. Because the Rosebud Reservation was the first reservation to which Congress applied its new policy in the specific form of the 1904 Act, the legislative and historical materials are more detailed than the materials surrounding the later acts which have been construed in the recent decisions.
2. Because the Rosebud Reservation was the target of three separate acts, and these separate acts are all the subject of one declaratory judgment action, this court has the unique opportunity of viewing the acts both retrospectively and prospectively.
3. Because at the time the recent decisions were made, not one of the courts involved was presented with either the legislative and historical origins of this particular form of reservation legislation or the legislative history of the particular act under consideration.[19]

The counties would submit that both Courts in the New Town[20] case, as a direct result of not having any one of these three distinct advantages, found themselves in the very difficult position of having to construe an act of Congress over 50 years old without the aid of legislative or historical material. In this position they could not discern any appreciable difference between the act before them and the one construed in the Seymour case and went with Seymour--and justifiably so. The same situation was presented immediately thereafter in United States ex rel. Condon v. Erickson, 344 F. Supp. 777 (D.S.D., 1972), and State v. Molash, --S.D.--, 199 N.W. 2d 591 (1972), and in view of

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[18] In City of New Town v. United States, 454 F. 2d 121 (8th Cir. 1972), Seymour was cited for the proposition that "the opening of an Indian reservation for settlement by homesteading is not inconsistent with its continued existence as a reservation." 454 F. 2d at 125. Similarly, New Town cited Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), for the proposition that "the purpose to abrogate treaty rights of Indians is not to be lightly imputed to Congress." 454 F. 2d at 126. Early in plaintiff's brief it recognized and cited the rule correctly, but by page 43 it evidently preferred its own version: "the general principal that Indian treaty rights will be abrogated only by unequivocal Congressional language." B.P. at 43. Plaintiff's version of the case itself is set forth at xi, xii:

> The clearest example of this concept [bundle of rights] appears in Menominee Tribe v. United States, supra. When the Menominee Reservation was originally established, the Indians received a bundle of rights, including not only the right to occupy the land but also the right to hunt and fish freely. By the Menominee Indian Termination Act of 1954, 25 U.S.C. Section 891 - 902, the entire Menominee Reservation was disestablished and destroyed. Nevertheless, the United States Supreme Court held that although nothing at all was left of the reservation lands after the termination act, at least one of the original rights in the bundle of rights was not destoryed [sic] by the act. That Court failed to find any Congressional intent to end the tribal rights to hunt and fish as originally granted. B.P. at xi - xii.

The counties would call to the Courts attention the rather atypical situation with which the Supreme Court was presented in Menominee. The ratio decidendi of the case centered around the fact that the termination act, although passed in 1954, did not become fully effective until 1961. In the interim, Public Law 280, also passed in 1954, did become effective and specifically reserved hunting, trapping and fishing rights to the Menominee Tribe. Hence, the Supreme Court held the Termination Act did not destroy those rights. This Court must read the Menominee opinion to fully appreciate the disparity.

[19] This discussion is limited to those decisions discussed in 18 S.D. L. Rev. 85, 122 - 128 (1973).

[20] City of New Town v. United States, Civ. No. 1038 (D.N.D. January 26, 1971); City of New Town v. United States, 454 F. 2d 121 (8th Cir. 1972).

Seymour and New Town, the same result followed. Now, plaintiff is asking this court in view of Seymour, New Town, Condon and Molash to follow through--and his brief would have left this court in the same position.[21]

Irrespective of whether or not the construction of the acts in the New Town, Condon and Molash cases actually conformed with the intent of Congress, this type of case law can only be of questionable value. In the first place, if the decisions are incorrect, the counties are at a distinct disadvantage which did not arise as a result of having the merits of an issue previously decided against them. In the second place, and most importantly, the materials set forth and theories enunicated in the opinions could still be detrimental even in light of the obvious merit of the counties' position. The plaintiff's "bundle of rights" theory is a perfect example (B.P. at x, xi, xii, 42, 43, 50) and one relied upon heavily by the Court of Appeals in New Town.

The cornerstone of this argument is the "nothing in this act shall be construed to deprive the said Indians of the [x] Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provision of this act" provision appearing in all of the homestead acts recently construed. In its polished form the entire argument procedes along these lines:

> Here the 1891 boundaries of the Fort Berthold Reservation were established as a result of Congressional ratification of an 1886 Agreement with the Indians. The right to have the reservation boundaries remain undiminished carries with it many important subsidiary rights, among them the right for unemancipated Indians to be subject only to federal and tribal jurisdiction. The 1910 Act specifically recognized that the opening of the reservation for homesteading was not intended to deprive the Indians of any rights not inconsistent with the Act, and as Seymour establishes, homesteading is not inconsistent with the maintenance of the original reservation boundaries. The 1910 Act clearly by its own terms does not purport to alter the reservation boundaries. City of New Town v. United States, 454 F. 2d at 125 (emphasis added).

This is a truly ingenious argument in that the court does not even have to look at anything other than the "preservation of rights" provision! Indeed, plaintiff even goes so far as to conclude that the "preservation of rights clause in Section 11 [1910 Act] would offer its own basis for finding an undiminished reservation" (B.P. at 51)--irrespective of the fact the 1910 Act on its face referred to the reservation "diminished." But what are the merits of this argument if the Court has an opportunity to look at something beyond the face of the act. In the Rosebud situation it need go no further than the House Report on the 1910 Act: "There will still be left a reservation containing about 1,000,000 acres, and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of." H.R. Rep. No. 429, 61st Cong., 2d Sess. 2 (1910). Certainly this would at least arouse the Court's curiosity as to the validity of plaintiff's position. Perhaps the Court would then look at the debates on the bill and notice the "placing through what were heretofore reservations actual settlers" comment appearing therein. 45 Cong. Rec. 5457 (1910). A Bundle of Rights in a heretofore reservation? At some point the Court would probably conclude that the only reason for the provision in the act was to guarantee a continuation of benefits to the Indians on that part of the reservation that would remain intact, or in other words to guarantee all benefits not inconsistent with the provisions of the act--precisely what the provision stated.

[21] Perhaps in an even more difficult position, for a "little" selected legislative history can be just as dangerous as the proverbial cliche about a "little knowledge."

To arrive at this conclusion one need not have even noticed that the provision appeared word for word in Article V of the original 1901 lump-sum cession agreement which even plaintiff concedes would have diminished the reservation.[22] A "right" to a secure reservation with a fixed boundary in a lump-sum cession agreement to cede part of that reservation would be a tenuous benefit at best and, therefore, the "bundle" argument in effect eventually destroys itself.

Even so, the counties are nevertheless somewhat perplexed at the transition from "benefit" to "right" and completely missed it until recently. It would appear that the court in New Town also missed this transition:

> The 1910 Act specifically recognized that the opening of the reservation for homesteading was not intended to deprive the Indians of any rights not inconsistent with the act. 454 F. 2d at 125 (emphasis added).

The Fort Berthold provision contained "benefits" and the term "rights" does not appear anywhere within the Fort Berthold Act.

Plaintiff makes this same transition, although it uses "rights":

> Preservation of Indian rights
> Of the six acts noted above, all but the Seymour Act contain a crucial clause guaranteeing the preservation of Indian rights . . . . Finally, Section 11 of the Mellette County Act provides that nothing in the Act shall be construed to deprive the Indians of any treaty right unless 'inconsistent with the provision of this act.' B.P. at 41, 50 (emphasis added).,

interchangeably with "benefits" or "prime benefits" throughout its brief. B.P. at 42. The terms "right" or "rights" do not appear anywhere within the text of the entire Mellette County Act. If this clause is such a crucial clause in plaintiff's argument, the counties submit that the terminology chosen by Congress should not be substituted with terminology chosen by plaintiff. Benefits under existing treaties are one thing--rights to a secure reservation are quite another.[23]

III. THE RECENT DECISIONS AND PLAINTIFF'S "AMBIGUITY" RULE

When the Rosebud materials present problems that are somewhat difficult to explain in a manner consistent with plaintiff's argument, these problems are dealt with in one of the three following ways throughout plaintiff's brief. Either:

1. Congress was incompetent, ambivalent or confused and should therefore be excused (B.P. at 29, 30, 31, 45), or
2. The plaintiff's selected legislative and historical materials "dispels the confusion" (B.P. at 31, 46, 48), or
3. At some point, although it is not always clear where, plaintiff's "presumption in favor of the preservation of Indian rights in doubtful cases" or "doubtful expressions are to be resolved in favor of the Indians" rule emerges and saves the day. B.P. at 8, 9, 25, 31, 45, 46, 47, 51.

[22] Article V of the original 1901 lump-sum cession agreement is the Article V of the 1904 Act. Congress enclosed it in quotation marks--i.e. "Article V . . . ." So the 1904 Act states "not inconsistent with this agreement", while the 1907 and 1910 Acts state "not inconsistent with this act." The origin of this provision can be traced into the 1800's.

[23] The only "benefits" mentioned in the Rosebud materials were along the line of rations, cattle, allotments, etc.

As to the first proposition--the counties think that this Court is quite capable of passing on the competency of Congress without any assistance from either the counties or the plaintiff.

As for the second proposition, enough has already been said about the merits of that material.

But the third proposition is an entirely different matter. Initially, it is interesting to note that neither the Seymour nor the recent opinions have even as much as mentioned this so-called rule, much less relied upon it. See Note 19, supra. Indeed, plaintiff even admits this in a round-about way when it states "that the Eighth Circuit Court of Appeals has suggested the first, second, and fourth" of its four principles. B.P. at 4. Nevertheless, plaintiff still maintains that "This court must consider four principles in determining whether the situs of an offense is 'Indian Country' for jurisdictional purposes." B.P. at 4 (emphasis added). The counties would submit that some sort of indicia as to the merits of the third principle in this mandate can be gleaned from the fact that it is rather conspicuously absent in all of the aforementioned opinions.

Secondly, the counties are somewhat confused at what point this court "must" invoke this so-called presumption, principle or rule. If plaintiff is saying that this Court cannot look at the legislative reports and history of the acts if it cannot resolve the issue with certainty from the face of the act; that this Court would at that point have to resolve the entire issue in the Indian's favor--the counties would have to strenuously object. Even plaintiff could not possibly piece together enough material to support such a presumption. The Seymour and recent opinions indicate that those courts at least considered everything that was even presented in the briefs in an attempt to construe the acts consistent with the intent of Congress.[24] In addition, both the majority and dissenting opinions in Menominee, which the counties have already suggested the Court examine for another purpose, (See Note 18, supra), are replete with citations to the Senate and House Documents, and the Congressional Record. The majority opinion even stated that "This construction is in accord with the overall legislative plan" (391 U.S. at 412), and their conclusion:

> buttressed by the remarks of the legislator chiefly responsible for guiding the Termination Act to enactment, Senator Watkins, who stated upon the occasion of the signing of the bill that it 'in no way violates any treaty obligation with this tribe.' 391 U.S. at 413 (emphasis added).

The dissenting opinion stated:

> The statute is plain on its face: after termination the Menominees are fully subject to state law just as other citizens are, and no exception is made for hunting and fishing laws. Nor does the legislative history contain any indication that Congress intended to say anything other than what the unqualified words of the statute express. 391 at 415 (Stewart, J., with whom Justice Black joined, dissenting) (emphasis added).

Again, the Supreme Court does not even mention plaintiff's so-called presumption, principle or rule in favor of the preservation of Indian rights in doubtful cases.

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[24] See, 18 S.D. L. Rev. 85, 122 - 128 (1973). At 127 therein (Note 156) it was stated that at the time of publication the authors were unable to procure the briefs submitted in the Seymour case. The counties have examined these briefs and they do not contain any legislative history of the Colville Act as such, or of the origins of the particular form of homestead act construed therein, although certain House and Senate documents of a later date are discussed in detail and appended in the appellant's brief. In short, the briefs were quite similar to the briefs submitted in the recent decisions.

Even the counties do not really think that plaintiff would actually maintain that this Court must automatically resolve the entire issue in the Indians' favor if the Court does not think it can resolve the issue with certainty from the face of the act. However, because we have not been able to determine with any degree of certainty exactly what plaintiff's position is on this point, we have had to discuss this possibility. For example: "The legislative history dispels the confusion on this point. In addition, this ambivalence renders the above language of the act subject to the rule . . . " B.P. at 31. Exactly when one can or cannot use legislative history or when this ambiguity rule is to be invoked, simply cannot be determined from this or any part of plaintiff's brief.

If there is such a rule that has any applicability to questions of the nature with which this Court has been presented, the counties would submit that it should only be considered after the Court has examined the legislative history and other materials in an attempt to clarify what, if any, doubts the Court might have of resolving the issue from the face of the act. In this respect, the counties have the utmost confidence that the Rosebud materials will more than merely clarify the situation.

Nothing in the foregoing discussion is intended to imply that the counties are denying the existence of some type of rule that permits certain aspects of Indian treaties to be construed in a light most favorable to the Indians. Rather, the counties would urge the court to examine COHEN, HANDBOOK OF INDIAN LAW at 37, 38 and the governments edition, FEDERAL INDIAN LAW, at 147 148,[25] so that the rules stated therein can be viewed in their proper perspective. Then, and only then, can the rather conspicuous absence of such rules in the Seymour and recent opinions, be readily understood. For it is one thing to speak in terms of a "presumption in favor of the preservation of Indian rights in doubtful cases", and it is quite another to state that:

> An accepted rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians. This rule is qualified by another rule, heretofore noted, that Indian treaties are to be construed according to their tenor and their terms are not to be varied by judicial construction in order to avoid alleged injustices. In other words, while an Indian treaty is to be construed so as to carry out the obligation of the Government in accordance with the fair understanding of the Indians, a court cannot, under the guise of interpretation create authority where none exists or rewrite congressional acts so as to make them mean something they obviously are not intended to mean . . . .
> [T]he courts have indicated that they will not judicially dispense with the conditions or requirements of the treaties upon any notion of equity or general convenience or substantial justice. Justice Harlan, in the case of United States v. Choctaw Nations, said:
>
> > But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with

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[25] Originally published in 1940, FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW was the first modern definitive compilation on the subject. In 1958, the Department of the Interior revised and brought the work up to date in a new publication, FEDERAL INDIAN LAW. Presumably, Mr. Cohen's views were not objective in the original edition (too much in favor of the Indian's position) and the Department of the Interior desired to rectify the situation with its revised edition. Certain individuals were offended and felt the views presented in the revised edition were not objective either (too much against the Indian's position) and the original edition has since been reprinted with a very poignant introduction chastising the Department of the Interior.

Irrespective of the merits of this controversy, the battle is illustrative of the dangers inherent in accepting at face value any of the later source materials, purporting to deal with the intent of Congress in the field of Indian legislation. This point has already been alluded to in Note 1, supra, as the reason the counties have preferred to rely upon the original documents. In addition, the area of Indian jurisdiction and reservation boundaries was not, as Justice Black pointed out in the Seymour opinion, Felix Cohen's forte.

Therefore, the counties are not concerned with the materials in either treatise that might be inconsistent with the position taken in this brief--unless they can be supported in the Congressional materials of the period with which we are concerned. Specific reference is made to much of Mr. Smith's law review article which finds its origins in and builds upon some of the materials and views presented in these works, a position which has been, until recently, systematically rejected by the courts presented with questions about the size of Indian Reservations in North and South Dakota.

> the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the Government. Congress did not intend, when passing the act under which this litigation was inaugurated, to invest the Court of Claims or this court with authority to determine whether the United States had, in its treaty with the Indians, violated the principles of fair dealing. *** FEDERAL INDIAN LAW, ch. 2, at 145, 146 (1958),

and

> A somewhat different, although related, rule of treaty interpretation is to the effect that, since the wording in treaties was designed to be understood by the Indians, who often could not read and were not learned in the technical language, doubtful clauses are resolved in a non technical way as the Indians would have understood the language . . . . Although an interpretation of a treaty should be made in the light of conditions existing when the treaty was executed, as often indicated by its history before and after its making, the exact situation which caused the inclusion of a provision is often difficult to ascertain. New conditions may arise which could not be anticipated by the signatories to a treaty. A practical administrative construction of a treaty which has long been acquiesced in by Congressional inaction is usually followed by the courts. Cohen, HANDBOOK ON FEDERAL INDIAN LAW, ch. 3, Section 2 at 37, 38 (1942) (emphasis added).

Indeed, some of the material presented therein would seem to effectively preclude plaintiff from attempting to attribute a meaning to "diminished" distinct from the sense in which it would "naturally be understood by the Indians." See. B.P. at 46, 48, 50. The complete lack of authority for this point is discussed at 39-40, supra.

IV. THE RECENT DECISIONS AND PLAINTIFF'S "PREPOSITION" ARGUMENT[26]

To fully appreciate the extent of plaintiff's reliance on the "preposition" argument, one need only refer to those sections of its brief wherein this argument is used not only to support the statement that "the three acts repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist as such" but also to support the proposition that "at least two presidents have interpreted the three acts not to have diminished the Rosebud Reservation." B.P. at 24, 44, 45 (emphasis as in original). The counties will discuss the different phases of this argument under the following subheadings:

A. THE ACTS

This phase of the preposition argument has its genesis in footnote 11 of the Seymour opinion wherein four sections of the Colville Act were cited for the proposition that the Colville act repeatedly referred to the Colville Reservation "in a manner" that indicated that Congress intended that the Colville Reservation continue to exist as such. 368 U.S. at 355. Justice Black did not specifically refer to any phrase within these sections nor did the opinion explain what was meant by "in a manner." Plaintiff has presumed that the Court was referring to phrases within those sections such as "on said reserva-

[26] The introduction to this argument and its inapplicability to the Gregory County materials is discussed at 20-21, supra. The material therein should be read in conjunction with the material set forth in this section.

tion" and has therefore extracted similar phrases from each and every section of the three acts. Although the counties cannot determine precisely what Justice Black meant, perhaps he thought the sections in some way referred to the continuing existence of a reservation which the state was maintaining would no longer exist at all.

In any event, the counties fail to see how the references cited by plaintiff support the proposition that "the three acts repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist as such." B.P. at 45 (emphasis as in original). For example, plaintiff cites "of the said Rosebud Reservation" from Section 2 of the Mellette County Act. B.P. at 44. That section states in part:

> Provided, That prior to said proclamation the allotments within the portion of the said Rosebud Reservation to be disposed of as prescribed herein shall have been completed . . . . Act, supra, Section 2.

The counties would submit that this, or any other reference to the countinuing existence of the Rosebud Reservation in the three acts, is not probative of the issue to be decided in this case for the simple reason that the counties are not, as was the case in Seymour, maintaining that the entire reservation would cease to exist.

Not one word of explanation of plaintiff's rationale appears in its brief other than: "Therefore, since the United States Supreme Court cites the above language of the Seymour Act in support of the proposition that . . . then the nearly identical language in the three acts must support with equal force that . . . ." B.P. at 45 (emphasis added). Why? Unless the mere fact that the Colville Act contained the phrase "of the said reservation" and the Mellette County Act also contains the phrase "of the said reservation" is supposed to be probative of something, the counties sincerely fail to see how this in any way supports the proposition that the acts "repeatedly refer to the Rosebud Reservation in a manner which makes it clear that the intention of Congress was that the Rosebud Reservation should continue to exist as such." B.P. at 45.[27]

Evidently the courts in the recent cases of New Town, Molash and Condon have not considered similar phrases appearing in those acts probative of the diminution issue either. None of the opinions even mentions them.

B. THE PROCLAMATIONS

Nor can the counties agree that the Presidential Proclamations indicate "at least two Presidents have interpreted the three acts not to have diminished the Rosebud Reservation." B.P. at 24 (emphasis added).

1. 1904 Proclamation--Although plaintiff actually concedes that from the language therein "one might infer that Roosevelt did contemplate a diminished Rosebud Reservation" (B.P. at 25), its statement remains "two presidents have interpreted the three acts not to have diminished the Rosebud Reservation." B.P. at 24 (emphasis added). How plaintiff eventually arrived back at the three act

[27] The Gregory County Act propositions do not even have this dubious distinction for they, as stated at 20-21, supra are all from Article IV of the 1904 Act, which is the Article IV of the original 1901 lump-sum cession agreement.

figure is illustrative of the rather tenuous nature of many of plaintiff's arguments. In essense it states: that Roosevelt nearly duplicated the language Congress used in the 1904 Act; that the 1904 Act is ambiguous and is subject to its "ambiguity" rule; and that therefore President Roosevelt's 1904 Proclamation should be equally subject to this rule. Hence, from two acts back to three acts! B.P. at 25. The counties would submit that the use of this type of analysis to support a statement that the 1904 Proclamation indicates President Roosevelt interpreted the 1904 Act not to have diminished the Rosebud Reservation is, at best, questionable.

2. 1907 Proclamation--The only support for plaintiff's statement in this instance is the "of" in the first paragraph of the 1907 Proclamation:

> Whereas by the Act approved March 2, 1907 (34 Stat., 1230), the Congress directed that all that part of the Rosebud Indian Reservation lying south of the Big White river, and east of Range 25 west, of the Sixth Principal Meridian, except all Sections 16 and 36, which were granted to the state of South Dakota, and excepting also such parts thereof as have been or shall hereafter be either allotted to Indians, selected by said state, or reserved for townsite purposes, be disposed of under the general provisions of the homestead laws of the United States, and be opened to settlement, entry and occupation only in such manner as the President might prescribe by proclamation;
>
> Now, therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power and authority vested in me by said Act of Congress, do hereby prescribe, proclaim and make known . . . . Act of August 24, 1908, 35 Stat. 2203 (emphasis added).

In the first place, the counties would submit that a singular unexplained "of" hardly supports an unequivocal statement that the Proclamation indicated that President Roosevelt interpreted the 1907 Act not to have diminished the Rosebud Reservation--and this "of" is not even of that status (i.e. unexplained). The source of the "of", as well as most of the entire paragraph, is exactly where plaintiff surmised President Roosevelt extracted his bad 1904 Proclamation language from: the act itself.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty five west of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians:
> Provided, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.
>
> Sec. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President . . . . Act of March 2, 1907, 34 Stat. 1230 (emphasis added).

Until the counties noticed plaintiff's explanation of the source of the phraseology in the 1904 Proclamation, they were admittedly somewhat concerned, not so much with the 1907 Proclamation,[28] as with the 1910 Proclamation. The explanation that the acts, which would of course refer to land to be disposed of as "within" or "a part of" the Rosebud Reservation, were the source of the phraseology appearing in the Proclamations, was indeed welcome.

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[28] The relation between the "preposition" argument and the "open" terminology is discussed at 54-55, infra.

3. 1910 Proclamation--Again, the only support for plaintiff's statement is a singular preposition, in this instance "within", appearing in the 1910 Proclamation:

> I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the Acts of Congress approved May 27, 1910 (36 Stat. 440), and May 30, 1910 (36 Stat., 448), do hereby prescribe, proclaim and make known that all the non-mineral, unallotted, unreserved lands within the Pine Ridge and Rosebud Reservations in the State of South Dakota, which have been classified under said Acts of Congress into agricultural land of the first class, agricultural land of the second class, and grazing land shall be disposed of under the general provisions of the homestead laws of the United States and of said Acts of Congress, and be opened to settlement and entry, and be settled upon, occupied and entered in the following manner, and not otherwise: . . . Act of June 29, 1911, 37 Stat. 1691 . . . (emphasis added).

As in the 1907 Act, the counties would submit that this singular "within" hardly supports an unequivocal statement that the Proclamation indicated President Roosevelt interpreted the 1907 Act not to have diminished the Rosebud Reservation. Although the precise source of the "within" cannot be fixed as conclusively as was the "of" in the 1907 Proclamation, perhaps because of the dual nature of this particular proclamation, the 1910 Act does contain a number of "withins". In any event, this whole process of building upon a singular preposition in a proclamation to support the statement that the proclamation indicated that the President interpreted the act not to have diminished the reservation; and from there to the main title that "Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation", is illustrative of the quantity and quality of the material upon which plaintiff relies and upon which the courts recently construing other homestead acts have had to rely. B.P. at 24.[29]

C. THE LATER MATERIALS

But for this reliance, as evidenced by footnotes 8 and 9 in the New Town opinion (454 F.2d at 125,126), the counties would not have indulged in picking these materials apart in an attempt to explain each and every preposition. Indeed, if we had to rely solely on this process and thereby necessarily disregard the tenor of the whole transaction, we would eventually come to a situation like that on page 1853 of the Congressional Record where the following title and remarks appear:

> Extension of time to Homestead Settlers on Rosebud Reservation, S. Dak., etc.
>
> Mr. MARSHALL. Mr. Speaker, I ask unanimous consent for the present consideration of the bill which I send to the desk.
> The SPEAKER. The gentleman asks unanimous consent for the present consideration of the bill the title of which the Clerk will report.
> The Clerk read as follows:
> A bill (s. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation with the limits of Gregory County, S. Dak . . .

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[29] The only other material plaintiff could muster to support this statement was (1) the mere fact that in 1934 the Secretary of the Interior approved the Tribes constitution--"The Secretary of the Interior has interpreted the three acts as not having diminished the Rosebud Reservation" (B.P. at 25, 26) and (2) that in 1972, the Field Solicitor of the Bureau of Indian Affairs, Aberdeen, South Dakota, issued a memorandum consonant with plaintiff's views (B.P. at 26, 27). Hence, "Those chiefly responsible for the administration of the three acts do not regard the three acts as having diminished the Rosebud Reservation" (B.P. at 24). The counties would submit that these are not exactly the type of administrative interpretations that are entitled to great weight, to say the least. The Department of the Interior's position in this respect is made quite clear in the documents written before and immediately after the passage of the three acts. See 11-12, 14, 19-20, 23, 24, 25, 28-32, 34-35, 36, 37-38, 40-42, 56, supra and infra.

> Mr. UNDERWOOD. Mr. Speaker, reserving the right to object, I would like to ask the gentleman as to whether this bill increases the size of the homestead?
> Mr. MARSHALL. No, sir; it does not. This bill simply gives to the settlers on the . . . Rosebud Reservations, which were opened by proclamation last fall, an extension of time of about sixty days, until May 1, to move on their lands and make improvements.
> Mr. UNDERWOOD. It does not increase the size of the homestead?
> Mr. MARSHALL. Not the slightest . . . . 39 Cong. Rec. 1853 (1905) (emphasis added).

The counties would then be at a loss for an exact explanation as such for Congressman Marshall's indiscriminate use of the preposition "on" and hence doomed to defeat. However, in light of the plain language of this statute, the House Report, the Senate Report, the title and remarks of Senator Gamble in the Congressional Record, and the information in the Interior documents,[30] the counties would still submit that, in its entirety, the judiciary could not expect a more relevant, consistent, clear, immediate, and unequivocal congressional confirmation that the 1905 "extension" statute and peripheral materials concerned therewith.[31]

The counties would also submit, that to view such prepositions in any other manner, and then either raise them to the status of an ambiguity and resolve the entire issue contrary to counties' position, or even worse, consider such prepositions as evidence of a congressional intent present in 1904 not to diminish the reservation, would be to completely nullify that effect which Congress considered an almost obvious corollary of the act itself.

The final aspect of the preposition argument remaining to be discussed is its use in conjunction with "opened" reservation terminology. At 13-14, supra, the counties have already discussed the fallacious nature of the mystical equation of this terminology with the trustee-homestead provision which supposedly "opened" a reservation without diminishing the size or boundary of that reservation. The combination of the two are illustrated in the following hypothetical 1905 statute:

> Chap. 178. An Act for the sale of isolated tracts in the former Rosebud Reservation.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the provisions of Section 1000 of the Revised Statutes of the United States as amended by the Act of May 31, 1904, relating to the sale at public auction of isolated tracts of the public domain, be, and the same are hereby extended and made applicable to lands within the portion of the Rosebud Indian Reservation, South Dakota, opened under the Act of April 23, 1904 . . . (emphasis added).

It is to be noted that the last part of the statute does not say "to lands [now] within the portion of the Rosebud Indian Reservation, South Dakota, opened under the Act of April 23, 1904" nor does it say "to lands [formerly] within the portion of the Rosebud Indian Reservation, South Dakota, opened under the Act of April 23, 1904." In fact, the counties would submit that the sentence is merely a

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[30] These materials are set forth at 18-19, supra.

[31] The counties would call to the court's attention the manner in which the subheadings in the Congressional Record correspond to the remarks of the Senators and Representatives. In this instance, Marshall refers to settlers on the Rosebud and the subheading in the Congressional Record refers to settlers on the Rosebud. Senator Gamble, however, more explicity refers to the extension of time which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation and the title in the Congressional Record merely states "Extension of time to Homestead Settlers." See 18-19, supra.

statement of the issue to be decided, i.e. whether the lands within the portion of the reservation, opened under the Act of April 23, 1904, are now within the reservation. In this context the "within" is meaningless and to equate "opened" with either diminished or non-diminished would be a classical example of begging the question. If this is so, how can the "within" in the body of the statute be said to be inconsistent with the "former" in the title and thereby render the statute inconsistent within itself?

Yet, this is precisely the case in footnote 9 of the New Town opinion, wherein the following example was cited for the proposition that the "later" statutes are "not always consistent, even within themselves":

> 9. For example, the Act of May 10, 1920, 41 Stat. 595, was entitled "An Act for the sale of isolated tracts in the former Fort Berthold Indian Reservation, North Dakota (emphasis added). However, the body of the statute referred to "lands within the portion of the Fort Berthold Indian Reservation, North Dakota, opened under the Act of June 1, 1910" (emphasis added). These lands were located through areas A and B. 454 F. 2d at 125, 126 (emphasis as in original).

The Rosebud hypothetical is of precisely the same text as the statute cited by the Court of Appeals. The only reason for its inclusion in this brief is to point out how the preposition argument in combination with the "opened" terminology, could lead one to find inconsistencies where none exist and thereby disregard whatever probative value a latter statute referring to a "former" reservation might have.

As to the later statutes which are truly inconsistent within themselves or, for that matter, any later reference where the lands in question are still being referred to as "within" or "on" or "in" the reservation, the counties would submit that this is a direct result of the titles and sections of the original acts themselves, referring to the lands in this manner. For example, the 1907 Act entitled "Act to open to settlement surplus or unallotted lands in the Rosebud Indian Reservation" (emphasis added) or the 1910 Act entitled "Act to authorize the sale and disposition of a portion of the surplus and unallotted lands in Mellette and Washabaugh counties in the Rosebud Indian Reservation." The other prepositions are scattered at random throughout the entire text of the three acts.

For any person drafting legislation or commenting upon the original act to refer to the phrases appearing in the original act, would certainly seem to be just as plausible as the alternative: That the entire Congress and just about everybody else concerned was so incompetent that they could not refer to a piece of legislation or draft a two-sentence bill concerned therewith without the same being either "internally inconsistent" or inconsistent with other similar legislation or remarks they had made the previous day.

V. THE STATUS OF THE OPENED ROSEBUD LANDS

There are two related aspects of plaintiff's position on this issue which merit some extended discussion.

A. INDIAN TITLE

Using the somewhat questionable phrase "Indian title" to describe a beneficial interest which it

maintains the Indians retained in the opened lands until they were disposed of, plaintiff states that "surely the prospect of lingering Indian title is incompatible with the notion of a diminished reservation." B.P. at 40. Along these same lines at 47 it reiterates:

> These surplus lands and unallotted lands in Mellette County did not become part of the public domain because the Rosebud Sioux retained an equitable interest in those lands until and unless the entryman perfected his entry. B.P. at 47.

The case of Ash Sheep Co. v. United States, 252 U.S. 159 (1920), cited by plaintiff that "made this distinction clear" (B.P. at 47) was not concerned with the Rosebud Reservation or even the issue with which this court is presented. The case itself has not been cited in or relied upon by either Seymour or the recent decisions. Nevertheless, plaintiff still maintains the Rosebud Sioux retained an equitable interest in these opened lands.

It is the counties' position that Congress intended the three acts to extinguish all "Indian title" to the extent that the only interest that remained was the right, as provided in the act, to the proceeds as the lands were disposed of. The 1912 Report of the Commissioner of Indian Affairs not only conclusively supports this position, but also reveals the source of some of the confusion in this particular area:

> Under various acts passed by Congress within recent years certain lands ceded by the Indians to the United States are open to settlement and entry, and the Government endeavors to dispose of them at their appraised value for the benefit of the Indians.
>
> Nearly all of such acts contain a clause practically identical with the following:
>
> That nothing in this act shall in any manner bind the United States to purchase any portion of the lands herein described, * * * or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided.
>
> It has been the practice to consider such lands under the jurisdiction and supervision of the General Land Office from the passage of the act, and the Indians' title thereto extinguished. On this theory the public at large has come to consider said lands a part of the public domain, and the lands have therefore been used indiscriminately by various interests, principally for grazing purposes, without compensation to the Indians.
>
> By departmental decision of November 27, 1911, it was held in effect that the Indians' title to such lands is not extinguished until date of entry, settlement, or sale, and the Indians are entitled to their use, or to any revenue that may be derived from their use by others, pending date of settlement, sale, or entry. Report of the Commissioner of Indian Affairs, 51 (1912).

As the report indicated, until 1912 it had been the practice to consider the Indians' title extinguished from the date the act was passed. In this respect the lands were considered a part of the public domain and therefore under the jurisdiction and supervision of the General Land Office. By departmental decision of November 27, 1911, however, the department, not Congress, decided to affect a procedural change in order to compensate the Indians for the use of the lands pending date of settlement, sale or entry.

In the first place, it should be noted that the effect of the three acts on the status of the land (the extinguishment of Indian title) remained unaffected by this departmental policy, as the acts themselves were in essence the final word from Congress on this point. Also, an examination of the Rosebud

materials presented elsewhere in this brief shows that time and time again, the members of Congress, the Department of the Interior, and the Commissioner of Indian Affairs, all attributed this extinguishing effect to the three Rosebud acts.

Secondly, the prospect of a lingering "Indian title" of the nature referred to in the above report, and which lasted only until the lands were disposed of, would not necessarily be inconsistent with the notion of diminished reservation.

B. PUBLIC DOMAIN

Throughout plaintiff's brief various other indirect and direct references are made to the concept of public domain. At one point, plaintiff notes that "Congress is certainly capable of making its intent clear to disestablish a reservation and restore it to the public domain." B.P. at 43. Later on the same page, plaintiff again refers to "the demonstrated capacity of Congress to use unequivocal language to disestablish a reservation and restore it to the public domain." B.P. at 43. These and other similar references could lead one to think that the only manner in which Congress was capable of disestablishing any portion of a reservation was by the process of technically restoring the lands therein to the public domain. Although the Rosebud materials do contain many references to the three acts restoring the opened lands to the public domain, the counties do not necessarily agree that this is the only manner in which Congress could extinguish or diminish a reservation.

Specifically, the counties have in mind and deem significant a statement by Judge Blackmun, now Justice Blackmun of the United States Supreme Court, appearing in the opinion of Beardslee v. United States, 387 F. 2d 280 (8th Cir. 1967),[32] an Eighth Circuit Court of Appeals case decided after the Seymour decision. Justice Blackmun therein referred to the absence of Federal jurisdiction on non-Indian land "on a disestablished portion of a reservation, however that disestablishment may have been affected." 387 F 2d at 286 (emphasis added).

In other words, it is the counties' position that merely because the earlier cessions referred to a restoration of lands to the public domain and such cessions have since been held to have extinguished or diminished reservations, it should not be automatically assumed that unless a specific act or the legislative history thereof indicated an intent to technically restore lands to the public domain, there could be no intent to extinguish or diminish that reservation.

Admittedly, the concept of the public domain is an excellent indicia of congressional intent, but it should not be deemed the sole process by which Congress can or has disestablished or diminished reservations.

VI. INDIAN COUNTRY: 18 U.S.C. Section 1151

Many of the older decisions of the Eighth Circuit have been highly regarded in the field of Indian Law. This esteem has not only been recognized by judicial bodies in other states and the United States

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[32] Discussed at 58-59, infra.

Supreme Court, but also by Congress. With specific reference to the effect of the homestead acts on the size of reservations in South Dakota, the case of United States v. LaPlant, 200 F. 92 (D.S.D. 1911), wherein Judge Willard stated that "No other meaning can be given to the words italicized ["thus diminished"] than that the reservations were diminished, and they were diminished by the act itself" (200 F. at 94), has been the cornerstone of this area of the law in this state for many years. Although the LaPlant case itself never achieved national prominence, it was cited with approval in other cases that definitely did. One such example was when the Eighth Circuit Court of Appeals decided Kills Plenty v. United States, 133 F. 2d 292 (8th Cir. 1943):

> In 1911, it was ruled in the case of United States v. LaPlant, D.C.S.D., 200 F. 92, that the federal court was without jurisdiction of the crime of murder committed on lands which were originally within the boundaries of the Cheyenne River Indian reservation but were excluded from the reservation by the Act of May 29, 1908, Chap. 218, 35 Stat. 460, diminishing the reservation. 133 F. 2d at 294.

The question in Kills Plenty was essentially the same question presented in Frank Black Spotted Horse, supra, and it was resolved in the same manner. Although both cases were concerned only with checkerboard jurisdiction in Todd County, neither case even mentioned Gregory, Tripp, Lyman or Mellette County. Indeed, no one could have read Kills Plenty without concluding that Todd County was the only county considered to be within the boundaries of the Rosebud Indian Reservation at that time. Certiorari was later denied and when 18 U.S.C. 1151 was revised in 1948, Kills Plenty was cited therein as one of the cases on which the 1151(a) definition of Indian Country was based. Revisor's note preceding 18 U.S.C. Section 1151 (1949). See also H.R. Rep. No. 304, 80th Cong. 1st Sess. A 92 (1947). Therefore, at the time Congress defined Indian Country as "all land within the limits of any Indian reservation" (1151[a]) and based that definition in part on the Kills Plenty case, at least the revisors realized that Todd County was the only county considered to be within the Rosebud Indian Reservation. By enacting 1151(a) and to this extent, Congress had eliminated the impractical pattern of checkerboard jurisdiction in the only area of the Rosebud Indian Reservation they though existed![33]

But even in 1948, Congress realized that 1151 (a) would not encompass all Indian allotments and so 1151(c) was set forth as an addition to the definition of Indian Country:

> All Indian allotments, the Indian titles to which have not been extinguished including rights of way running through the same. 18 U.S.C. Section 1151(c) (1949).

The counties would submit, and as recently as 1967 the Eighth Circuit Court of Appeals has so indicated, that this is the only section of 18 U.S.C. 1151 that has been or was intended to apply to Gregory, Tripp, Lyman and Mellette counties. Beardslee v. United States, 387 F. 2d 280 (8th Cir. 1967).

Beardslee involved essentially the same issue that had been presented in Kills Plenty and Frank Black Spotted Horse and the same result followed. In two other respects, however, the case is very interesting. In the first place, it was decided after the Seymour decision and specifically mentioned

[33] Other sections of the Revisor's note and H.R. Rep. No. 304, supra, also indicate that the men responsible for drafting Section 1151-1154 were very much aware of what were then the reservations in South Dakota. One can only imagine how these men, after reading Kills Plenty, would have enacted had the Eighth Circuit Court of Appeals in 1950, held that Gregory, Tripp, Lyman and Mellette counties were suddenly within the limits of the Rosebud Indian Reservation.

Gregory, Tripp, Lyman and Mellette counties in a manner inconsistent with plaintiff's position:

> 1. The Rosebud Reservation was established by, and is described in, Section 2 of the Act of March 2, 1889, 25 Stat. 888. The boundaries of Todd County, in which the town of Mission is located, are laid down in S.D. Code, Section 12.0162 (1939). All of Todd County is obviously within the original boundaries of the Rosebud Reservation. Only three Acts of Congress have affected the territory of the reservation since its establishment in 1889 and none of these concern Todd County. Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448. No part of the Todd County portion of the reservation has ever been formally opened. Instead, that portion has remained closed since 1889. The general geographical situation is thus clear. 387 F. 2d at 285 (emphasis added).

More importantly, the opinion referred to "a disestablished portion of the reservation, however that disestablishment may have been effected" (387 F.2d at 286), and specifically stated that:

> We regard clause (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent." Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. 387 F. 2d at 287 (emphasis added).[34]

As far as the counties have been able to determine, Frank Black Spotted Horse, Kills Plenty, and Beardslee are the only cases wherein the Eighth Circuit has been presented with a question involving Indian jurisdiction on the Rosebud Reservation. In all three, one cannot read the Court's opinion without concluding that Gregory, Tripp, Lyman and Mellette counties were simply not considered to be within the limits of the Rosebud Indian Reservation.

Secondly, irrespective of how the general issue before this Court is ultimately resolved, there is no question that the court in Beardslee correctly interpreted 1151(c) as applying only to non-reservation situations. To this extent, 1151(c) specifically approved checkerboard jurisdiction. The Revisor's note and the House Report stated that "Indian allotments were included in the definition on authority of the case of United States v. Pelican". The Pelican case specifically held that after a reservation had in fact been diminished, the allotments outside the boundaries of that reservation were still Indian country and would remain Indian Country until Indian title had been extinguished.[35] Yet, in the Seymour opinion the following statement appears:

> For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of Section 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought

[34] Most of the cases cited by plaintiff in its brief at 22, 23, were specifically cited with approval in the Beardslee opinion. Indeed, Judge Blackmun, now Justice Blackmun of the United States Supreme Court, who authored the Beardslee opinion, even cited LaPlant approvingly. 387 F. 2d at 286.

[35] 232 U.S. 442 (1913). Revisor's note preceding 18 U.S.C. Section 1151 (1949). See also, H.R. Rep. No. 304, 80th Cong., 1st Sess. A 92-94. (1947).

to avoid. 368 U.S. at 358 (emphasis added).

Although Justice Black was concerned only with the rejection of checkerboard jurisdiction within the boundaries of a reservation, as the italicized portion of his statement indicates, the paragraph is still confusing in this respect: Federal jurisdiction does not depend solely upon the existence or non-existence of a reservation. In the situation described in 1151(c), law enforcement officers will still have to "search tract books" and to this extent the "impractical pattern of checkerboard jurisdiction" has not been "avoided by the plain language of Section 1151."

In Gregory, Tripp, Lyman and Mellette counties, the law enforcement officers have searched the tract books for years. Until Congress decides otherwise, the counties would prefer to remain "non-reservation lands" irrespective of the temporary inconvenience of the impractical pattern of checkerboard jurisdiction as set forth in 1151(c). This is especially so in light of the alternative: that of being thrust within the boundaries of a reservation which the counties have not been within for over 50 years.

CONCLUSION

In plaintiff's words:

> This action seeks declaratory judgment as to the effect of these acts, 1904, 1907, 1910, on the size of the reservation. In truth, the action asks the Court to define for the parties the present boundaries of the Rosebud Indian Reservation. A.P. at 2.

The first part of this brief contains unequivocal probative evidence of the precise effect Congress intended these acts to have on the size of the reservation; the second part contains an evaluation of the applicable case law and plaintiff's sophisticated arguments.

The counties have submitted that the applicable case law should not be construed as a mandate for this court to disregard the effect, as evidenced by the materials in part one, that Congress intended the three acts to have on the size of the Rosebud Indian Reservation. Similarly, the material in part one was also relied upon to dispose of plaintiff's bundle of benefits, presumptions, prepositions and ambiguities; a most sophisticated argument to be sure, but not to the degree that it could weather a full exposure to the Rosebud documents.

Admittedly, the method used by Congress to open the Rosebud Reservation was different from the method used by Congress in the 1800's. Nevertheless, with respect to the Rosebud Reservation, the concept of a reservation diminished remained the same and this concept permeates the Rosebud documents of the period. Plaintiff has not nor cannot produce sufficient material from any Rosebud source prior to 1911 to clearly support its position that Congress did not intend to diminish the Rosebud Reservation by the passage of the three acts. In the absence of such support to counter the intent expressed in the documents presented herein, the counties would submit that just as there was no occasion to continue a reservation larger than Todd County in 1910, there is no occasion to enlarge that reservation today.

Andrew W. Bogue
U. S. District Judge
Rapid City, South Dakota 57701

United States District Court
District of South Dakota

P. O. Box 207.
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Re: Rosebud Sioux Tribe v. Hon. Richard Kneip, Governor of the State of South Dakota, et al. - CIV72-3015

Gentlemen: MEMORANDUM OPINION

The Rosebud Sioux Tribe has brought this declaratory judgment action pursuant to 28 U.S.C. §2201 et seq. seeking declarations that three specific acts of Congress did not diminish the Rosebud Sioux Reservation or alter its boundaries from those defined in the act of March 2, 1889. The defendants, the State of South Dakota and the counties of Mellette, Todd, Tripp and Gregory, assert that the three acts did diminish the Rosebud Reservation so that that reservation presently embraces

only Todd County, South Dakota. Acting on this assertion, the defendants have been exercising both civil and criminal jurisdiction over members of the Rosebud Sioux Tribe within the counties of Mellette, Lyman, Tripp and Gregory. The plaintiff does not seek a declaration of the exact nature of the jurisdiction, or the exact rights and privileges that members of the Rosebud Sioux Tribe enjoy in the four counties in question. The plaintiffs do ask this Court to declare whether or not any of the three statutes in question operated to diminish the geographical territory over which the tribe is entitled to exercise jurisdiction.

In recent years there have been many cases with substantially similar questions presented to the state and federal courts. See, Conway v. Superintendent, 368 U.S. 351; 82 S.Ct. 424 (1962); Rosebud v. Arnett, 93 S.Ct. 2265 (1973); City of New York, U. S. v. United States, 454 F.2d 121 (8th Cir. 1972); United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973); United States ex rel. John Feather v. Erickson, (8th Cir., filed Dec. 7, 1973, No. 73-1453 to 73-1459); State of South Dakota v. Holeeh, 199 N.W. 2d 591 (S.D. 1972); State of South Dakota v. Williamson, 211 N.W. 2d 182 (S.D. 1973). It is conceded that a declaratory

judgment is an appropriate remedy in this circumstance.

PRELIMINARY STATEMENT

In 1868 the United States and the Great Sioux Nation agreed upon the establishment of the Great Sioux Indian Reservation. This treaty was ratified by Congress on February 16, 1869, (15 Stat. 635), and proclaimed by President Andrew Johnson on February 24, 1869. This reservation, as formed by the 1868 Treaty, encompassed all the present state of South Dakota west of the eastern bank of the Missouri River, including the four counties in question. However, the Great Sioux Reservation, as originally established, was diminished by a series of acts. An Act of March 2, 1889, (25 Stat. 888) reduced the Sioux lands to about half their former extent and explicitly restored the remainder to the public domain. This is conceded by the Tribe. In that act, the Rosebud Sioux Reservation was established and contained the counties of Mellette, Tripp, Todd and part of Gregory and Lyman. The statutory description of the Rosebud Reservation was as follows:

> "Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle

> of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel to a point due south from the mouth of Black Pipe Creek; thence due north to the mouth of Black Pipe Creek; thence down White River to a point intersecting the west line of Gregory County extended north, thence south on said extended west line of Gregory County to the intersection of the south line of Brule County extended west; thence due east on said south line of Brule County extended to the point of beginning in the Missouri River, including entirely within said reservation all islands, if any, in said river."

In United States v. Celestine, 215 U.S. 278, 30 S.Ct. 93, 95 (1909) the Supreme Court of the United States said:

> "When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."

The United States Eighth Circuit Court of Appeals has just recently set forth clear guidelines for district courts in determining jurisdictional questions relating to Indian reservations. The Court said in United States, ex rel. Feather, et al. v. Erickson, supra, the following:

> "We have these guidelines: (1) Intent to abrogate treaty rights is not lightly

> imputed to Congress. Minnesota Tribe of Indians v. U. S., 391 U.S. 404, 413 (1968); (2) Congress having once established a reservation, all tracts remain a part of that reservation until separated therefrom by Congress. U. S. v. Celestine, 215 U.S. 278, 285 (1909); Seymour v. Superintendent, 368 U.S. 351, 359 (1962). Indeed, Congressional intent to disestablish the reservation must be either expressed on the face of the Act or be clearly discernible from the 'surrounding circumstances and legislative history.' Mattz v. Arnett, ___U.S. ___, 93 S.Ct. 2245, 2253 (1973); United States ex rel. Condon v. Erickson, 478 F.2d 684, 689 (CA8 1973); (3) Opening an Indian reservation for settlement by homesteading is not necessarily inconsistent with its continued existence as a reservation. Seymour, supra. See also, Condon, supra; The City of New Town, North Dakota v. United States, 454 F.2d 121, 125 (CA8 1972); (4) The well-preserved general rule is that Indians are to be left free from state jurisdiction and control. McClanahan v. State Tax Commissioner of Arizona, ___U.S. ___, 93 S.Ct. 1257 (1973); Condon, supra at 689 and citations. Federal jurisdiction is preferred. McClanahan, supra. (Slip opinion p.p. 6-7)

Certainly in construing treaties and statutes passed for the benefit of Indians and Indian tribes, courts must construe them liberally and wherever possible resolve any doubt in favor of the same. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Carpenter v. Shaw, 280 U.S. 363 (1930); Choate v. Trapp, 224 U.S. 665 (1912); Alaska Pacific Fisheries v. United States,

248 U.S. 78 (1918).

In regard to the three acts in question, it becomes the duty of this Court to examine those acts in relation to the guidelines set forth above to determine whether or not the Congress of the United States, in passing those acts, intended to diminish and extinguish the portions of the reservation covered in those acts, or merely to open those portions of the reservation to homesteading, and to not affect the outer confines of the Rosebud Reservation thereby. The acts in question are as follows: April 23, 1904 (33 Stat. 254); March 2, 1907 (34 Stat. 1230); May 30, 1910 (36 Stat. 448). The issue has been extensively and excellently briefed by both sides. In addition, this very issue has been discussed at length in two law review articles. See, Comment, Now Town, et al: The Future of an Illusion, 18 S.D. Law Rev. 85 (1973); Smith, Now Town, et al: A Reply, 18 S.D. Law Rev. 327 (1973). This Court will consider the acts in the order of passage.

1904 ACT
(Gregory County)

The operative language of the 1904 Act reads as follows:

"Article I. The said Indians belonging

> on the Rosebud Reservation, South Dakota, for the consideration herein named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows:..."

The 1904 Act originated in 1901. When the Rosebud Reservation was created by Congressional Act in 1889, §12 of that Act read as follows:

> "Section 12 - That at any time after lands have been allotted to all the Indians of any tribe as herein provided for, or sooner, if in the opinion of the President, it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with any Indian tribe for the purchase and release by said tribe in conformity with the treaty or statute under which said reservation is held of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell on such terms and conditions as shall be considered just and equitable between the United States and said tribes or Indians, which purchase shall not be complete until ratified by Congress:..." Act of March 2, 1889, §12 (25 Stat. 888).

Pursuant to Section 12, an agreement was reached with the Rosebud Sioux Tribe in 1901 to cede the surplus, unallotted portion of the Reservation lying in Gregory County to the

> that the intention of the Act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale therefore only as the same are received." H.R. 10418, 58th Cong., 2nd Sess., January 21, 1904, p. 2.

The plaintiff states in its brief:

> "thus, it is clear that, although the Gregory County act does employ some language to the effect that the United States was purchasing a tract of land outright for a consideration with the tribe retaining no interest, this was not the case. Congress actually had just abandoned this policy in favor of a policy whereby the United States acted merely as trustee for the sale of lands for the Indians, with the proceeds of the lands being paid to the tribe only if and when actually received from the homesteaders, instead of the United States paying the Indians a lump sum immediately and then trying to find buyers to recover the purchase price. As Burke stated, the Gregory County Act would establish a new policy, the refinements of which had yet to be made." Plaintiff's brief, (hereinafter cited as PB), at p. 30.

It is, however, the defendant's position that this "new policy" related solely and only to the method of payment and that the purpose and effect of the 1904 Act was the same as the 1889 Act in that regard. That is, that the opening of that portion of the reservation worked a diminution of the

United States. However, the 1901 agreement itself was never ratified by Congress. The portion of Gregory County opened to non-Indian settlers was not approved by Congress until 1904. It is the plaintiffs' contention that this delay marked a departure point--a point at which the whole tenor of congressional reservation policy changed. It appears that the plaintiff concedes that the 1901 agreement would have worked a diminution of the reservation. The plaintiff quotes the following House Report in support of this contention:

> "Both of those bills present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement... This bill provides that the land shall be disposed of under the homestead laws by the settler paying therefor, and the proceeds paid to the Indians, and it is expressly provided by Section * of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or dispose of the same except as provided, or to guarantee to find purchasers for said lands, it is expressly stated

outer confines of the reservation and extinguished the same, making the reservation smaller than it originally was.

The Congressional Record is replete with speeches, debates, reports and discussions which tend to support the theory that the time lapse between 1901 and 1904 was because of a change in policy relating to the method of purchasing the lands, rather than the effect that the purchase would have. At 35 Cong. Rec. 3187-88 (1902) is the following statement:

> "Mr. Platt...it is true that several years ago, I think—in opening Indian reservations, we paid large and extravagant prices for the land to the Indians, upon the theory that the Government was going to be reimbursed for its expenditures by the settlers paying for the land which they settled upon, a sufficient sum to reimburse the Government. That went on for years, and everybody supposed that that was acceptable to the settlers. When the settlers began to agitate that the Government should remit to them the obligation which they had incurred to pay for the land, and thereby reimburse the Government, and the history of this agitation, of course, is well known. The Government remitted about $35,000,000 which it had paid to the Indians and which the settlers agreed to repay to the Government by the passage of that free homes bill."

At 35 Cong. Rec. 4801-02, Mr. Platt continues the discussion:

> "Now this particular agreement comes here to be ratified on a payment to

> the Indians of about $2.50 an acre for the surplus lands within their reservation which are under the agreement to be ceded to the United States and become part of the public domain. The Indians, in negotiating, said that was not a fair price for the land and they were worth a great deal more. But finally the negotiation was concluded. The agreement comes here. So far as the Senate considers it, it is an agreement to open a reservation—to pass ordinarily without any particular examination or any thought of the consequences to the government in the matter of expense. I will not go into history of the negotiations as to these lands, but the price paid or agreed to be paid to the Indians is $2.50 an acre for the entire acreage which is to be brought under the public domain by cession to the United States.
>
> The bill proposes that the land thus acquired shall be opened to homestead settlement without requiring any payment for the land settled upon from the settler. My amendment proposes that the settler pay $2.50 an acre, being the same which the government has agreed to pay to the Indians, and that thus the government shall be reimbursed for the amount expended for the purchase...." (Emphasis added)

And at 35 Cong. Rec. 4807, the following statement is seen:

> "Mr. Platt...here is this reservation in South Dakota. Of course the senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation,

> as a matter of progressive Indian policy, for the purpose of separating the Indians and establishing the reservation or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that the land is primarily and inheritantly worth so much an acre." (Emphasis added)

And finally, after the original bill was, in fact, amended this discussion takes place in the House of Representatives:

> "Mr. Burke...Mr. Speaker, this bill provides for the opening to settlement of 416,000 acres of land, now a portion of the Rosebud Reservation in South Dakota, being that portion of the reservation in Gregory County. In 1901 a treaty was entered into with the Rosebud Indians on the part of the United States, by which the Indians agreed to sell to the government this land for $2.50 per acre. That treaty was transmitted to Congress, and because of the fact that it provided that the government should pay for the lands outright and then take the chance of the Treasury being reimbursed by disposition of lands to settlers, it never got further than through the Committee on Indian Affairs, which unanimously reported it favorably. It was never given consideration in the House.
>
> Toward the concluding days of the last session of Congress, a new bill was prepared, substantially as this bill now provides, and that bill provided that the lands should be ceded by the Indians to the government, disposed of

> to settlers under the provisions of the Homestead Law, the price to be fixed at $2.50 per acre, as was provided in the original treaty. That bill did not receive consideration in the last Congress because of lack of time, but during the summer that bill was submitted to this tribe of Indians for their acceptance and 48 more than a majority consented to accept the terms of that bill. This bill is substantially the same as the bill which I have just referred to, except that the Committee, in view of a suggestion made by the Commissioner of Indian Affairs, in which he said he has no objection to the passage of this bill, provided the Indians were insured of as much money as they would have received under the treaty, instead of fixing the price at $2.75, which was provided in the bill submitted to the Indians during the summer, fixed the price at $3.00 per acre for all the lands taken within the first six months, and $2.50 for all lands taken thereafter.
>
> It was thought by the Committee that this would certainly insure the Indians as much money as they would have received under the original treaty, and, in my judgment, it insures their receiving considerably more. There is no opposition to the passage of this measure so far as I know." 38 Cong. Rec. 1423 (1904). (Emphasis added)

It appears, then, that the 1904 Act, as finally passed, incorporates verbatim, the entire text of the 1901 agreement with the exception of the 1901 lump sum section (the 1901 appropriation provisions). It appears that the new policy was, in fact, merely a change in an appropriations matter

and not a change in any substantive effect of the act in question. The extended discussions just quoted center on appropriations problems while assuming that the reservation would be extinguished and the land returned to the public domain. The Eighth Circuit Court of Appeals had occasion to consider the effect of this change in policy in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). In Condon, the Court said:

> "Appellee thinks it significant that the 1908 Act provided for the proceeds from the sale of the lands to be deposited into the Treasury of the United States and accredited to the Indians as was the case in the 1906 (Bonesteel) and 1910 (Fort Thom) Acts. This method contrasts with prior acts wherein payment for the land was made directly to the Indians. It has been aptly pointed out, however, that this was simply a new method utilized by a Congress that no longer favored purchasing Indian land and providing them free of cost to settlers." 470 F.2d 684, 687.

This Court, then, is satisfied that the 1901 agreement and the 1904 Act, concerning Gregory County, were considered by the Congress of the United States to be one and the same with the exception of the appropriation (homestead) provision. The true issue is, however, what was the intention of Congress with regard to the boundaries of the reservation in the 1904 Act.

What was the intention then of Congress in this opening of the portion of the Rosebud Reservation in Gregory County? It is now clearly established that the opening of an Indian reservation is not necessarily inconsistent with the reservation remaining geographically as large as it once was. Seymour v. Superintendent, supra; Mattz v. Arnett, supra. Again, legislative history is helpful in relation to these acts. c.f. U. S. ex rel. Condon v. Erickson, 478 F.2d 684, 688 (8th Cir. 1973); See, Mattz v. Arnett, 93 S.Ct. 2245, 2258 (1973).

Congressional Statements

There are many statements in the Congressional Record which tend to support the defendants' theory that the size of the Rosebud Reservation was, in fact, diminished by the 1904 Act. One quotation, in a committee report, is enlightening:

> "There is no question but that the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract, and a reservation about equal in size to the Pine Ridge Reservation in South Dakota." H.R. Rep. No. 443, 56th Cong., 2nd Sess. (1904).

Clearly the report suggests that the size of the reservation will be changed. A quick glance at a map will show that Gregory County must be removed to provide a "square treat". A copy of a page containing such a map is appended herein as Appendix A. The map is originally found at Comment, Tony Town, et al.: The Future of an Illusion, 18 S.D. Law Rev. 85, 129 (1973).

In addition, the following discussion takes place at 35 Cong. Rec. 4007:

> "Mr. Clatt...here is this reservation in South Dakota. Of course the senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation, as a matter of progressive Indian policy, for the purpose of separating the Indians and extinguishing the reservation or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that the land is primarily inherently worth so much an acre." (Emphasis added)

And again, in H.R. Rep. No. 443, 58th Cong. 2nd Sess. at p. 4 (1904), the following quotation is made of testimony of the Commissioner of Indian Affairs in front of the House Committee on Indian Affairs:

> "If you depend on the consent of the Indians as to the disposition of the lands where they have the fee to the land, you will have difficulty in getting it and I think the decision in the Lone Wolf case, that Congress can do as it sees fit with the property of the Indians will enable you to dispose of the land without the consent of the Indians. If you wait for their consent in these matters, it will be fifty years before you can do away with the reservations."

The law review article cited immediately above contains an extensive discussion of this matter.

It is difficult to read the House and Senate debates and reports without coming to the conclusion that the 1904 Act was an attempt to "do away" with the Rosebud Reservation in Gregory County. That purpose simply seems to be an assumption upon which all actions were taken and statements premised. Other materials similarly lead to that conclusion, however.

School Land Provision

Upon this state's admission to the Union, South Dakota's enabling act provided that:

> "Nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become part of the public domain." Act of Feb. 22, 1889, ch. 10, 25 Stat. 676

The 1901 agreement did not contain a school lands provision. However, Senator Gamble from South Dakota proposed, and the Senate adopted, a school lands provision in 1902. Senator Gamble explained to the Senate the reason for his amendment:

> "Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the land restored to and became a part of the public domain. This would withdraw about 29,000 acres of these lands and would leave 307,000 acres to be opened to settlement and which would be affected by the proposed amendment." 35 Cong. Rec. 3187 (1902).

Here is an unequivocal statement and corresponding action by the Senate of the United States premised solely and only upon the fact that the title of the Indians was extinguished and the lands restored to the public domain. It is a strong indication by Congress that its intention was to diminish the size of the Rosebud Reservation. The amendment was adopted without discussion, again buttressing the impression that the diminution of the Rosebud Reservation was a premise upon which all members of Congress acted when enacting the various Indian acts.

And again, when the school lands provision was proposed in the House of Representatives and a Rep. Finley questioned the appropriation for those school lands, Congressman Burke, a member of the House Committee on Indian Affairs, and a South Dakotan, responded:

> "I am glad that the gentleman has asked me that question. I would state that under the enabling act under which the State of South Dakota was admitted to the Union, it was provided that sections 16 and 36 in said state should be reserved for the use of the common schools of that state, and it further provided that as to the lands within an Indian reservation the portions of that grant would not become operative until the reservation was extinguished and the lands restored to the public domain. That enabling act was passed by Congress on the 22nd day of February, 1889. In March of that same year, Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or twelve million acres of land, and made an express appropriation, in accordance with that enabling act, to pay outright out of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the Treaty. Mr. Finley... 'Then as I understand the gentleman, he bases the wisdom or equity for this provision upon the enabling act admitting South Dakota into the Union. Mr. Burke, 'Yes'. Mr. Finley, "and not otherwise?' Mr. Burke, 'no'." 38 Cong. Rec. 1423 (1904).

The plaintiff herein makes reference to a statute (43 U.S.C.A. §865) which provides for the granting of school lands in opened reservations that are not restored to the public domain. This statute is not in point for it allows the state to select lands for school purposes prior to the opening of such reservation. However, the 1904 Act specifically referred to sections 16 and 36 in its granting of school lands and its legislative history indicates it was done in response to South Dakota's enabling act. This Court feels that 43 U.S.C.A. §865, in fact, lends weight to the argument that the express grant of school lands in the 1904 Act bolsters its position. Had Congress merely been "opening" the reservation for settlement, it could have used 43 U.S.C.A. §865 to supply the state of South Dakota with school lands. This method was not used, however.

The school lands provision stands as a clear indication of congressional intent to restore Gregory County to the public domain. See, United States ex rel. Condon v. Erickson, 478 F.2d 684, 686 (8th Cir. 1973). Other congressional enactments express the same intention, however.

Subsequent Enactments

In 1905 Congress passed an act to extend the time in which settlers could establish their residence in Gregory County under the homestead acts. As will be seen in the following quotations, there is a clear expression from Congress therein that Gregory County had ceased to be considered in the "congressional mind" as reservation or "Indian land". In Rosebud Sioux Tribe v. Kneip, 93 S.Ct. 2245, 2250 (1973), the Supreme Court discussed subsequent legislation to bolster its opinion that the reservation at issue therein had not been extinguished. In Senate Report No. 2760, 58th Cong., 3rd Sess., p. 1 (1905), the following appears:

> "The Committee on Public Lands, to whom was referred the bill to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Reservation, within the limits of Gregory County, South Dakota, having had the same under consideration, beg leave to report the bill back with the recommendation that it be amended, and that as amended it do pass." (Emphasis added)

Senator Gamble, in remarks before the Senate, found at 39 Cong. Rec. 1578 (1905), said the following:

> "I ask unanimous consent for the present consideration of the bill to provide for the extension of time within which homestead settlers may establish their reserve-

> tion upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota..." (Emphasis added)

The operative language of the Act of February 7, 1905, ch. 545, 33 Stat. 700 is as follows:

> "An act to provide for the extension of time within which homestead settlers may establish residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County...." (Emphasis added)

Here then, is another clear indication that the Congress of the United States considered the reservation nature of Gregory County extinguished. Congress, in its act, had referred to this land as heretofore a part of the reservation.

Conclusion

This Court is of the opinion that the contemporary history of the 1904 Act indicates a congressional intent to extinguish that portion of the reservation. The defendant's brief reveals several contemporary documents and sources that buttress this opinion. At no time can this Court find an express discussion of state versus federal jurisdiction over the lands in question. However, the whole

tenor of the discussion in Congress convinces this Court that the purpose was to "do away" with the reservation in this area. This Court is convinced that the only interest that the Rosebud Sioux Tribe retained in the Gregory County lands was to be in the proceeds from the sale of those lands. There was never any question in anyone's mind but that the lands would be sold. At this time the demand for land for settlers was great.

The case of Ash Sheep Co. v. The United States, 252 U.S. 159, 40 S.Ct. 241 (1920) is not in point. The act in question therein contains several provisions which the 1904 Act does not. Ash Sheep itself recognized that each treaty must be judged by itself.

That being the case, it is this Court's judgment that the confines of the Rosebud Sioux Reservation were diminished by the 1904 Act and the reservation or Indian land nature was extinguished therein, and Gregory County restored to the public domain.

1907 ACT
(Tripp and Lyman Counties)

On March 12, 1907 Congress passed an act concerning Tripp County and a portion of Lyman County.[4] Each treaty or act must be analyzed separately to determine congressional

intent. See, U. S. v. Ash Sheep Company, 252 U.S. 159 (1920); Kills Plenty, et al. v. United States, 133 F.2d 292, 295 (8th Cir. 1943).

The operative language of the 1907 Act is as follows:

> "Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior be and is hereby authorized and directed as hereinafter provided, to sell or dispose of all that portion of the Rosebud Sioux Reservation in South Dakota lying south of the Big White River and east of Range 25 West of the 6th principal Meridian, except such portions thereof as have been or may hereafter be allotted to Indians..."

Again, this Court should examine the history of the 1907 Act to determine congressional intent.

Negotiations

In 1906 Inspector James McLaughlin conducted negotiations with the Rosebud Sioux Indians for the cession of their unallotted lands in Tripp and Lyman Counties. Inspector McLaughlin was the very person who conducted the negotiations for the 1901 agreement and the 1904 Act. It is interesting to note that the transcript of their discussion adds weight to this Court's conclusion that the 1904 Act diminished and extinguished the Rosebud Reservation. The following quotation

is found on page 5 of the hearing transcript held at the Rosebud Agency in 1906:

> "Inspector McLaughlin....There is no railroad running over any portion of the Rosebud Reservation, none within the boundaries of your reservation. That railroad in Gregory County has not yet come across your reservation boundary, but should it come into your reservation, you would receive pay for its right of way. Any of the Indians who may live in Gregory County whose allotments have been crossed by that railroad, have, or will receive pay for the privilege of crossing their allotments. So you need not worry about that, my friends." Dec. 14, 1906, Rosebud Agency Hearing by James McLaughlin, U. S. Indian Inspector, page 5.

It appears then that Inspector McLaughlin's assumption was that Gregory County was no longer a part of the Rosebud Sioux Reservation.

The Indian people during the negotiations expressed concern for the need of their land. Statements made by various Indians again buttressed this Court's opinion that the 1904 Act, in fact, diminished the reservation. A prime example is the following quotation:

> "High Pipe:....My friends, our Gregory County payment lasts two years yet. We all know that. The best land we have is in the eastern part of our reservation, Tripp County. The

> Indian people want to get land for their children there. They are very anxious to get land for their children down there." Rosebud Hearing, 1906, supra, page 8.

So it can be seen that the Indian members at this time recognized Tripp County as the eastern portion of their reservation. Gregory County does, of course, lie east of Tripp County. See map appended to this opinion. It is difficult for one to read the transcript of the negotiations in 1906 without feeling that this was merely a continuation of the original negotiation in 1901 which culminated in the Gregory County act, the 1904 Act, discussed above. That plainly is the import of all the discussion held therein. Chief Picket Pin, after discussing the Great Father's need for land said: "My friend, you are going home this time without any land." Rosebud Hearing, 1906, supra, page 7. The 1907 Act was clearly a continuation of the policies followed in the past. Not only the transcript of the negotiations for the 1907 Act indicate this conclusion, but the congressional history as well.

Congressional History

There are many statements contained in the Congressional

Record and various congressional reports which indicate an intent by Congress to diminish the confines of the Rosebud Reservation yet another time. As stated in H.R. Rep. No. 7613, 59th Cong., 2nd Sess. p. 1 (1907):

> "The purpose of this bill is to authorize the opening and sale of that portion of the Rosebud Reservation in South Dakota known as Tripp County, and it affects all that portion of the reservation east of Range 25 of the 5th Principal Meridian south of the Big White River and embraces about one million acres.
>
> In the second session of the 58th Congress a law was passed authorizing a sale of so much of this same reservation as was located in Gregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County."

The exact same statement may be found in S.Rep. No. 638, 59th Cong. 2nd Sess., p. 1 (1907). In addition, Congressman Burke stated on February 16, 1907, the following:

> "Mr. Burke from South Dakota....Mr. Speaker, the bill has the unanimous report of the Committee on Indian Affairs, in which committee it was very carefully considered. The bill is substantially in accordance with an agreement which has just been made with the Indians, signed by 42 more than a majority of the male Indians over the age of 18 years. It is in line with recent bills that have been passed affecting the sale of Indian Reservations.... The Indians, as I have

> stated before, have agreed to the disposition of it under the terms of the bill. They will have left, after this land is disposed of, a reservation that is substantially fifty miles square, and there are only 5,000 Indians." 50 Cong. Rec. 3104 (1907). (Emphasis added)

It can be seen, upon examining a map, that the quotation "fifty miles square" referred to in the quote relates approximately to the size of the reservation minus Gregory, Tripp and Lyman Counties. Mellette and Todd County make up a generally square area, roughly fifty miles on a side. Again, one can see the continuous policy with relation to the Rosebud Indian Reservation in opening the reservation, diminishing the reservation, and extinguishing the reservation nature of the lands concerned.

School Lands

Again, in the 1907 Act, the act makes provision for school lands as did the 1904 Act. The congressional committee reports state that the school land provision contained in the 1907 Act is for the same reason that the school land provisions were included in the 1904 Act already referred to and discussed above. The following report can be found at H.R. Rep. No. 7613, 59th Cong., 2nd Sess., pp. 3-4 (1907), and S.Rep. No. 6338,

59th Cong., 2nd Sess., p. 3 (1907):

> "Section 6 of the bill reserves sections 16 and 36 in each township for the use of common schools, and grants the same to the State of South Dakota. And section 7 makes an appropriation to pay for the same at $2.50 per acre. This is following the precedents which have heretofore been established in the opening of other reservations in South Dakota, and is based upon section 10 of the Act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:
>
> > "Sec. 10. That upon admission of each of said states into the Union, sections 16 and 36 in every township of said proposed states, and where such sections, or any portion thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, or other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior; provided that the 16th and 36th sections embraced in permanent reservations for national purposes shall not at any time be subject to grants nor indemnity provisions of this act, nor shall any lands

> embraced in Indian, military or other reservations of any character be subject to the grants or the indemnity provisions of this act until the reservation shall have been extinguished and such lands restored to and become a part of the public domain.'"

Here again in the 1907 Act we have both the House and Senate reports on the bill referring specifically to the extinction of the reservation and the restoration of those lands to the public domain. This is a clear indication of congressional intent.

Allotments

In the case of Mattz v. Arnett, 83 S.Ct. 2245 (1973) the Court discussed the allotment provisions of the treaties involved. The Court in Mattz said:

> "The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. This is apparent from the very language of 18 U.S.C. §1151, defining Indian country notwithstanding the issuance of any patent therein." 93 S.Ct. 2245, 2257.

There are allotment provisions in the 1907 Act. In Section 2 the following was stated:

> "... provided, that prior to said proclamation, the Secretary of the Interior, in his discretion, may permit

> Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation...."

The clear import of that section is that the Indians in the portion soon to be opened, were allowed to relinquish that part of the reservation and remove to the diminished portion of the reservation. The 1910 Act, to be discussed hereinafter, made that alternative explicit. It is clear that after that portion of the reservation had been opened, the land would be disposed of under the general homestead and townsite provisions and laws and that there would be from that time after no further allotments made in this area. The allotment provisions provided for or discussed in Mattz are as follows:

> "Provided, that any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment.... and the Secretary of the Interior may reserve from settlement, entry, or purchase, any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians...." See, 93 S.Ct. 2245, 2253.

It is clear from that quotation that the act in question contemplated a continuing presence or at least the option

to the Secretary of the Interior to declare a continuing presence of reservation in the area opened. No such provision is made in the 1907 Act herein. In fact, the import of the act contemplates no such continuing area that may be "set apart...for the permanent use and occupation..." of the Indian. The allotment section in the 1907 Act merely allows the Indians the option to keep the allotment that they then had or give up that allotment and remove to some other portion of the reservation prior to the proclamation of the Act. See, Sec. 2, Act of March 2, 1907. As can be seen from page 17 of the transcript of the hearing conducted by the Inspector McLaughlin with the Indians concerning the 1907 Act, the allotment provisions contained therein are to assure that all Indians within the Rosebud Reservation who had not before been allotted lands would receive such lands before such time as the settlers were allowed to homestead in the area. See Dec. 14, 1906, Rosebud Agency Hearing by James McLaughlin, U. S. Indian Inspector, p. 17. There is no provision in the 1907 Act for continuing allotment provisions.

Subsequent Enactments

And again, subsequent laws enacted by Congress refer to

Tripp County as "formerly within the Rosebud Reservation." See, Mattz v. Arnett, 93 S.Ct. 2245, 2250 (1973). The Act of January 11, 1915, 33 Stat. 792, is such an act:

> "An act providing for the purchase and disposal of certain lands containing the minerals kaolin, kaolinite, Fuller's earth, China clay, and ball clay, in Tripp County, formerly a part of the Rosebud Indian Reservation in South Dakota.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all lands containing the minerals known as kaolin, kaolinite, Fuller's earth, China clay and ball clay, in Tripp County in what was formerly within the Rosebud Indian Reservation in South Dakota, and has heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such minerals...." (Emphasis added)

Here then, is a subsequent act of Congress which specifically refers to Tripp County as having been separated from the Rosebud Reservation. It is a clear indication of the intent of Congress. Again, in the Act of August 17, 1911, Ch. 22, 87 Stat. 21, the language is as follows:

> "Be it enacted...that any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation in the State of South Dakota, authorized by Act approved March 2, 1907...."

The above must be taken as a clear indication of congressional intent with regard to the extinction of the reservation nature of the lands in Tripp County. Really no clearer indication could be asked for than acts of Congress which refer to the 1907 Act and to Tripp County as formerly within the confines of the Rosebud Reservation.

The defendants' brief contains numerous citations to other letters and reports of various government officials and agencies which constantly refer to the Tripp County section of the Rosebud Reservation as having been separated from the reservation, or having been formerly within the reservation. These contemporary documents must lend credence to the defendant's argument that it was, in fact, the intent of Congress to diminish the Rosebud Reservation once again by means of the 1907 Act. Again, the whole tenor of the contemporary documents seem to suggest to this Court that it was, in fact, the intent of Congress to diminish the Rosebud Reservation. The transcripts of the hearings held in 1906 and 1907 by Inspector McLaughlin constantly refer to the Gregory County Act and that taking in the same vein as the taking in 1907 by the Tripp County Act. There seems

to have been no question to the participants in those conferences but that the land would no longer be considered reservation land. There is the reference in the hearing transcript to Tripp County being the eastern section of the reservation and that this eastern section would then be taken. The Congressional debates once again seem to simply assume and have as their underlying premise that the separation and opening of Tripp County would work a diminution of the reservation. This Court is of the opinion that the surrounding circumstances, the congressional history and the contemporary documents of the 1907 Act clearly indicate the intention of Congress to diminish the Rosebud Reservation and extinguish the reservation nature of those lands in Tripp and Lyman Counties.

1910 ACT
(Gallette County)

Again, in 1910 Congress turned its eye to the Rosebud Reservation. Again the pressures for land for settlers were great, not only from the South Dakotans, but from people from the east who wished to move west. The response to this pressure was yet another bill to open the Rosebud Reservation for homestead settlement. The operative language of the 1910

Act is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior be and he is hereby authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Wabash,..."

Again, this Court must examine the Congressional Record and other contemporary history of the passing of the 1910 Act to determine the intent of Congress with respect to that act.

Congressional Statements

In January of 1910, Senator Crawford, discussing the Rosebud Reservation, made the following statement in the Congress of the United States:

> "Mr. Crawford...By treaties negotiated from time to time, and by laws enacted from time to time, the area of lands occupied by the Indians has gradually narrowed to smaller and smaller limits until now the lands owned by the Indians are comparatively small in quantity. They are not lands which in their possession bring any revenue whatever. They do not cultivate them. They neither fish nor game upon them. The policy of the government toward the Indians and toward these lands has changed in more recent years simply in this respect--

> ...that the land be sold and the proceeds be made into a trust fund, the principle forever held inviolate and the income from which is devoted to the Indians .... 45 Cong. Rec. 1066 (1910).

By this statement one can see the indication that Congress considered the openings in the three acts discussed so far to be a continuous process of narrowing the range upon which the Indians would roam and "civilizing" that part of the western United States. The statement above stands mainly for the proposition that each of the acts must be viewed in light of the other.

In Senate Report No. 887, 60th Cong., 2nd Sess., p.p. 1-2 (1909), the following report is made to the Senate of the United States concerning what was to become the 1910 Act:

> "The present area of the Rosebud Indian Reservation aggregates 1,800,000 acres. The land proposed to be opened to settlement under the provisions of this bill embrace an area of about 900,000 acres.... It was at first contemplated to submit this bill, through an Indian inspector, for the consideration of the Rosebud Indians, but the Inspector, who for a number of years has had that especial work in charge, is otherwise occupied and has been unable to take it up and it is felt by the Committee that the provisions of the bill are fair and just to the Indians in all respects.

> and it would delay the consideration of the matter unduly if the action were withheld for that purpose and the measure could not receive consideration during the present session of Congress.
>
> "The reservation is yet large, and in the judgment of your Committee the surplus and unallotted lands are unnecessary for the use of the Indians .... It also provides that the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area proposed to be opened to relinquish such allotment and receive in lieu thereof allotments anywhere within the reservation proposed to be diminished." (Emphasis added).

And in a report in the House of Representatives, H.R. Rep. No. 429, 61st Cong., 2nd Sess. p. 2, (1910), the following statements are made:

> "The Rosebud Indian Reservation when set aside as a separate reservation under the Sioux Act of 1889, contained something over 3,000,000 acres of land. In 1904 the unused and unallotted portion of the reservation in Gregory County, about 500,000 acres, was disposed of and the Indians received therefrom something more than $1,500,000. In the 59th Congress a law was enacted authorizing the sale of the unused and unallotted lands in that portion of the reservation in Tripp County, comprising about 1,000,000 acres, under a bill substantially in the same form as the bill now under consideration, except that the price of the land was fixed in the law, whereas under this bill the price is to be fixed by appraisement....

> "The area comprised in the present bill is about 600,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There will still be left a reservation containing 1,000,000 acres, and as the Indians have all been allotted, there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of. (Emphasis added).

Here, perhaps, is the strongest statement yet in a House of Representatives committee report concerning each of the acts in question, in this Court's opinion. The committee starts by saying that the reservation was once 3,000,000 acres of land and finishes by saying that after the passage of the 1910 Act the reservation would contain only 1,000,000 acres. The report says that there is no need for a continuing of a reservation larger than the one that will result after the opening and disposal of the land in Mellette County. There can be little question from reading this House Report but that the House of Representatives contemplated a diminished reservation by not only the 1910 Act, but the acts passed in 1904 and 1907 as well. In addition, Mr. Burke from South Dakota made the following statement during the debates on the 1910 Act:

> "I might say, Mr. Speaker, that there are two propositions to be considered in disposing of the unallotted and unused lands on Indian reservations. One is at the earliest possible date, to get among the Indians, the white men and have those lands that are of no benefit to anyone that are lying idle, doing no good, opened up and developed into farms, and I believe that the placing through what were heretofore reservations, actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to those allotments which at present are of little value." 45 Cong. Rec. 5457 (1910)

School Lands

Again, the 1910 Act provides for school lands as did the 1904 and 1907 Acts. The Senate Report No. 887, 60th Cong., 2nd Sess., p. 2 (1909) provides:

> "Section 16 and 36 of the lands in each township are not to be disposed of, but are reserved for the use of the common schools of the state, and those lands are to be paid for by the government in conformity with the provisions of the act admitting the State of South Dakota into the Union."

H.R. Rep. No. 429, 61st Cong., 2nd Sess., p. 2 (1910), states almost the identical language in its report to the House concerning the bill. This Court has discussed in the sections

on the 1904 and 1907 Act what it feels the import of the school lands provision is. Certainly the enabling act which admitted South Dakota to the Union discussing the disestablishing of the reservation and its return to the public domain must be a strong indication of congressional intent in this regard.

Intoxicants

Section 10 of the 1910 Act prohibits the introduction of intoxicants into the lands concerned with in this act. There is no dispute but that at this time there were federal laws prohibiting the introduction of all forms of intoxicants into "Indian country". The plaintiff would attach to this provision the congressional intent to continue the lands in Mellette County as Indian lands. This Court thinks, on the contrary, that the limiting of the prohibition of intoxicants to 25 years, clearly indicates an intent of Congress that this was not to be considered henceforth Indian land. Evidently Congress felt that it must provide a special section to prohibit such intoxicants for a period of time to protect the Indians who still had allotted lands in that area. If Mellette County continued to be "Indian land", why would

Congress feel the need to enact a specific act continuing the liquor prohibition, but only continuing it for a period of years? An eminent scholar on Indian law has the answer to that question:

> "In connection with the power to regulate commerce with the Indian tribes there exists also the authority granted by the Constitution to do all things necessary and proper by way of carrying out its provisions. Pursuant to this power and the power over the territory and other property belonging to the United States, the federal government has imposed liquor restrictions on land ceded to it by the Indians when these lands adjoined Indian country. The purpose of this measure was to prevent sale of liquor on the boundaries of the land retained by the Indians. Except for these extensions of the liquor laws into "buffer" areas the states would have had the exclusive police power thereon. Such extensions have been repeatedly upheld by the Supreme Court." F. Cohen, Handbook of Federal Indian Law, (University of New Mexico Press) p. 353 (1942 ed.).

An interesting and enlightening discussion concerning the liquor provisions is found at 45 Cong. Rec. 5463-64 (1910):

> "Mr. Coebel.... I am opposed to attaching to the sale of any reservation, conditions such as are proposed in this bill.
> Mr. Gronna.... Does the gentleman believe it would be safer on a reservation where liquors are permitted to be sold?

> Would the gentleman not buy land on a reservation where protection is given by the government, even if such reservation is located in a prohibition state?
> Mr. Coebel.... Oh, I do not know what I would do. At present I would want to get the land without any conditions attached. You must also bear in mind that when the lands are sold, there is no longer a reservation and the laws of the state apply....
> Mr. Butler.... If the land is sold it will be no longer an Indian reservation. It is where, as I understand, the Indian has always lived and where he is going to live, and I believe in keeping the sale of liquor out of his neighborhood, and for that purpose I propose in a kind and gentle way to suggest to gentlemen that if there is to be an attempt made to prevent a restraint being imposed upon this title, they had better have a quorum of the House present to insure the success of the attempt." (Emphasis added).

Clearly this discussion indicates that the participants did not feel that the lands to be ceded and opened were reservation but that the liquor prohibition should be continued and remain so that the Indians who had an allotment in Mellette County would not be exposed to or affected by or tempted by "demon rum". It is this Court's opinion that the Indian agency and Indian schools provided for in Section 1 of the 1910 Act also fit within this rationale. Congress knew that various members of the Rosebud Sioux Tribe had taken allotments in

the lands soon to be ceded, and these provisions attempted to continue to provide for those people in that area, although the land would no longer be considered as reservation.

Allotments

This Court has discussed, in relation to the allotment sections of the 1907 Act, the United States Supreme Court's recent opinion in the case of Mattz v. Arnett, 93 S.Ct. 2245 (1973). In the Mattz opinion the Supreme Court made reference to the continuing nature of the allotment provisions to buttress its opinion that the Congress of the United States had no intention to extinguish the reservation nature of the lands involved. The 1910 Act which we are concerned with herein, also has certain allotment provisions contained in it.

> "Provided, that any Indians to whom allotments have been made in the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation;" (Emphasis added.)

This allotment section is addressed in Senate Report No. 887, 887, 60th Cong., 2nd Sess., p. 2 (1909):

> "It also provides that the Secretary of the Interior in his discretion, may permit Indians who have an allotment within the area proposed to be opened to relinquish such allotments and receive in lieu thereof allotments anywhere within the reservation proposed to be diminished."

This whole concept seems to be contrary to the concept that Mellette County continued as reservation land. In fact, in this Court's opinion, this allotment section provides the strongest indication yet that the area in question was no longer to be considered "Indian land". Congress, in effect, offered to allow Indians to exchange and take their allotments in what would continue to be Indian land so that they might continue to benefit from all of the programs that the government had on the reservation. They need not retain their allotment in what was no longer to be considered a reservation. Clearly there is no other reasonable explanation for such a provision.

Subsequent Enactments

As with the other acts described herein, subsequent acts of Congress lend credence and buttress this Court's opinion as to the effect of the 1910 Act. The Act of March 3, 1919,

40 Stat. 1420, provided as follows:

> "The Secretary of the Interior is hereby authorized to sell and convey to the White River Cemetary Company, for cemetary purposes, for a price not less than the appraised value thereof, a ten acre tract within the former Rosebud Indian Reservation in Mellette County, South Dakota, described as the NE¼ of the SE¼ of the NE¼ of Sec. 34, Twp. 42 N., Rg. 29 W., 6th Principal Meridian, or such part thereof as may be required:"

Again, this is an indication that Congress regarded Mellette County as having been separated from the Rosebud Reservation and restored to the public domain. See, Matts v. Arnett, 93 S.Ct. 2245, 2258 (1973).

Conclusion

Again, the defendant cited to this Court reports and letters from various government bodies, officials and interested people which tend to confirm this Court's opinion that Mellette County was intended to be severed from the reservation and returned to the public domain. The school lands section, the intoxicants section, the allotments section all lend credence to this Court's opinion. This Court feels that the clearest indication yet of the congressional intent to diminish the Rosebud Reservation is expressed in the 1910

Act and the congressional history surrounding that act. It is clear from the congressional history that Congress viewed the 1904, the 1907 and the 1910 Acts as one continuous program of reducing the size of the various Indian reservations in the State of South Dakota so that settlers from the east could come in and acquire the land they so hungered for and so that the Indian people of South Dakota would become "more civilized". There is no doubt in this Court's mind, after having reviewed the contemporary documents from the passage of the 1910 Act, and the congressional history thereof, that the Congress of the United States had the intention of diminishing the Rosebud Reservation and restoring Mellette County to the public domain under the jurisdiction of the State of South Dakota thereby.

CONCLUSION

The plaintiff brought this declaratory judgment action seeking declarations that the acts of Congress discussed herein, did not diminish the Rosebud Sioux Reservation or alter its boundaries from those defined in the Act of March 2, 1889. This Court has felt compelled to investigate and examine the legislative history of the three acts in question

in order to make a determination in this action. See, Mattz vs. Arnett, supra; Seymour v. Superintendent, supra; and United States ex rel. Feather v. Erickson, supra. As the United States Supreme Court said in the Mattz case, "A congressional determination to terminate must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history." 93 S.Ct. 2245, 2258. It is this Court's opinion after having examined all the contemporary legislative materials, various government reports and discussions that the whole context of the acts from 1904 through 1910 had but one purpose in mind. It is clear that the purpose of those acts was to open those reservations to non-Indian settlers and to civilize those areas in what the Congressmen obviously regarded as an uncivilized portion of the United States. As each successive act was proposed in Congress various reports referred to a continuing diminished size of the Rosebud Reservation. Originally the reservation was said to comprise 3,000,000 acres, and later 1,800,000 acres, and finally to comprise a reservation roughly the size of 1,000,000 acres. The allotment sections, the school lands provisions, the many negotiations conducted by Inspector McLaughlin, the congressional reports and debates, and the

subsequent congressional enactments for each act lead this Court to believe and be of the opinion that the surrounding legislative history and the circumstances clearly indicate a congressional intent to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or "Indian land" nature of those counties thereafter.

Certainly this is the treatment that has been accorded those counties from the time of the acts' passage on. There is no dispute but that the State of South Dakota has treated the counties of Mellette, Tripp, Gregory and what was at that time Lyman County, as portions of the state over which the State of South Dakota can exercise jurisdiction since the passage of those acts. In fact, the Eighth Circuit Court of Appeals has in the past assumed, but clearly without deciding, that Todd County was the Rosebud Reservation and that other acts had affected the territorial nature of the reservation. In Beardslee v. United States, 387 F.2d 200, 205 (8th Cir. 1967), the Court said:

> "All of Todd County is obviously within the original boundaries of the Rosebud Reservation.... Only three acts of Congress have affected the territory of the reservation since its establish-

ment in 1962 and none of these concern Todd County."

The Court then went on to cite the very three acts which this Court is concerned with herein. The above is cited not for the fact that the Eighth Circuit had decided the jurisdictional questions herein, but only for the fact that the jurisdictional boundaries were treated by common usage, to have been diminished by the three acts in question. This is distinguished from the situation in Seymour. See, Seymour v. Superintendent, 368 U.S. 351, 359 (1962).

This Court feels that the following report by the Commissioner of Indian Affairs cited to this Court by the defendants and given in 1912 is very enlightening upon the whole subject discussed at length herein:

> "Under various acts passed by Congress within recent years, certain lands ceded by the Indians to the United States are open to settlement and entry, and the government endeavors to dispose of them at their appraised value to the benefit of the Indians.
>
> "Nearly all such acts contain a clause practically identical with the following:
>
> > 'That nothing in this act shall in any manner bind the United States to purchase any portion of the lands herein described...[1]

> or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided.'
>
> "It has been the practice to consider such lands under the jurisdiction and supervision of the General Land Office from the passage of the act, and the Indians' title thereto extinguished. On this theory the public at large has come to consider said lands a part of the public domain, and the lands have therefore been used indiscriminately by various interests, principally for grazing purposes, without compensation to the Indians.
>
> "By departmental decision of November 27, 1911, it was held in effect that the Indians' title to such land is not extinguished until the date of entry, settlement, or sale, and the Indians are entitled to their use, or to any revenue that may be derived from their use by others, pending date of settlement, sale or entry." Report of the Commissioner of Indian Affairs, p. 51 (1912). (Emphasis added).

The Commissioner did not question that the lands returned to the public domain but only when they did so.[1]

This Court has examined the issues involved here very closely. The decision herein affects a large portion of the State of South Dakota. The decision will have great political, social, cultural and economic effects. From the time these acts were passed, these counties have been treated as outside the Rosebud Sioux Reservation by the settlers, their descendents, the State of South Dakota and the federal courts.

There can be little doubt but that the members of Congress coveted the Indian lands. This Court must determine the intent of Congress as it existed at the turn of the century. Time and again the Indians were given reservations, only to have the settlers' need for land mandate a redefining of the reservation boundaries. While this Court does not necessarily agree with the mores or the methods employed at that time, there is little doubt that the congressmen were engaged in the process with the "doing away" of the reservations. This Court's only function is to determine congressional intent, not to rewrite history.

This Court is aware of the many decisions that various courts have rendered regarding the jurisdictional boundaries of various Indian reservations. However, each congressional act and treaty is different and must be so examined. As the

Eighth Circuit Court of Appeals said in Killa Plenty, et al. v. United States, 133 F.2d 292, 295 (8th Cir. 1943):

> "It can, of course, be argued that the words 'within the limits of any Indian reservation' should mean the same thing in any statute, but the argument, we think, is unsound.... To find that meaning the words must be viewed in their setting and the history and purpose of the act must be considered."

The surrounding circumstances, the history, congressional and otherwise, and various documents, convince this Court that the three acts in question did diminish the Rosebud Sioux Reservation and that the State of South Dakota can exercise jurisdiction over Indian people in the counties of Gregory, Tripp, Mellette, and that was Lyman.

The defendants herein shall forthwith prepare the necessary papers to effectuate the opinion of this Court as expressed in this Memorandum Opinion.

BY THE COURT:

ANDREW W. BOGUE, JUDGE
United States District Court